

# MORAL RIGHTS, TERMINATION RIGHTS, RESALE ROYALTY, AND COPYRIGHT TERM

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## HEARING BEFORE THE SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES ONE HUNDRED THIRTEENTH CONGRESS SECOND SESSION

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# CONTENTS

JULY 15, 2014

Page

## OPENING STATEMENTS

The Honorable Howard Coble, a Representative in Congress from the State of North Carolina, and Chairman, Subcommittee on Courts, Intellectual Property, and the Internet .....	1
The Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary, and Member, Subcommittee on Courts, Intellectual Property, and the Internet .....	2
The Honorable Bob Goodlatte, a Representative in Congress from the State of Virginia, and Chairman, Committee on the Judiciary .....	4
The Honorable Jerrold Nadler, a Representative in Congress from the State of New York, and Ranking Member, Subcommittee on Courts, Intellectual Property, and the Internet .....	4

## WITNESSES

Karyn A. Temple Claggett, Associate Register of Copyrights, Director of Policy and International Affairs, U.S. Copyright Office	
Oral Testimony .....	7
Prepared Statement .....	10
Rick Carnes, President, Songwriters Guild of America	
Oral Testimony .....	18
Prepared Statement .....	20
Casey Rae, Vice President for Policy and Education, Future of Music Coalition	
Oral Testimony .....	35
Prepared Statement .....	38
Michael W. Carroll, Professor of Law, and Director, Program on Information Justice and Intellectual Property, American University Washington College of Law, and the Public Lead of Creative Commons USA	
Oral Testimony .....	44
Prepared Statement .....	46
Thomas D. Sydnor II, Visiting Scholar, Center for Internet, Communications and Technology Policy, American Enterprise Institute	
Oral Testimony .....	60
Prepared Statement .....	62

## APPENDIX

### MATERIAL SUBMITTED FOR THE HEARING RECORD

Letter from the Directors Guild of America (DGA) and the Writers Guild of America, West Inc. (WGAW) .....	78
Prepared Statement of the Library Copyright Alliance .....	82
Prepared Statement of Public Knowledge .....	86
Letter from Sotheby's, Inc. and Christie's Inc. and Attachment .....	94
Prepared Statement of the Visual Artists Right Coalition .....	111



## **MORAL RIGHTS, TERMINATION RIGHTS, RESALE ROYALTY, AND COPYRIGHT TERM**

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**TUESDAY, JULY 15, 2014**

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY,  
AND THE INTERNET

COMMITTEE ON THE JUDICIARY

*Washington, DC.*

The Subcommittee met, pursuant to call, at 1:30 p.m., in room 2141, Rayburn House Office Building, the Honorable Howard Coble (Chairman of the Subcommittee) presiding.

Present: Representatives Coble, Marino, Goodlatte, Chabot, Fartenhold, Holding, DeSantis, Smith of Missouri, Nadler, Conyers, Chu, Deutch, DelBene, Cicilline, and Lofgren.

Staff Present: (Majority) Joe Keeley, Chief Counsel; Olivia Lee, Clerk; (Minority) Heather Sawyer, Minority Counsel; and Jason Everett, Counsel.

Mr. COBLE. Thank you again, ladies and gentlemen, for your patience. We're ready to get underway here.

The Subcommittee on Courts, Intellectual Property, and the Internet will come to order.

Without objection, the Chair is authorized to declare a recesses of the Subcommittee at any time.

We welcome all of our witnesses today as well as those in the audience. I'll give my opening statement at this point.

This afternoon, ladies and gentlemen, the Committee considers several issues that focus on the rights of the creator, often referred to as the "little guy." I have great respect for artists and musicians in our Nation, and they aren't always treated as well by the copyright system as they should. Not everyone is big enough to retain counsel to fight infringement or a lobbyist to ensure their rights are protected as much as the "big guy."

Moral rights may not be as large in the U.S. as overseas, but as the co-chair of the Creative Rights Caucus, I've long believed that artists should get the credit they are due. Although vast financial rewards do not always follow the vast investment of a creator's time, it doesn't seem that much of a burden to assure that the creator's work is recognized, as his is in the first place. Recognition may not fully replace financial reward when the mortgage comes due, but at least it preserves the ability to earn financial rewards

in the future time when someone hears that song or for the first time sees that photograph.

As a fan of bluegrass and old time country, and old time bluegrass, for that matter, I'm sure there are a number of artists who would like to exercise their termination rights at some point. U.S. law has long permitted artists to reclaim their copyright, and it is worth learning how the termination process is or is not working today.

As everyone knows, the Committee extended the term of copyright 20 years ago in 1998, and its decision to do so was upheld by the Supreme Court in 2003. Two of our witnesses today will speak primarily to this issue.

Finally, the issue of resale royalties, one that my colleague from New York has taken a keen interest in. It does seem unfair to visual artists that those who profit from their efforts are usually not the artist themselves, but are those who see fine art as a financial investment. I would like to learn more about the resale royalty this afternoon, but I would say at this time that I am not uncomfortable with the notion of a resale royalty.

Again, thank you for being here. And I am now pleased to recognize the distinguished gentleman from Michigan, the Ranking Member of the full Judiciary Committee, Mr. Conyers.

Mr. CONYERS. Chairman Coble, I thank you very much for recognizing me.

And to all of our witnesses, we apologize for having so few, but we ran out of table space and we couldn't take on any more, but we welcome all of you.

Because today's hearing provides an opportunity to examine moral rights, termination rights, resale royalties and copyright terms. Mr. Chairman, we could have had at least four individual hearings on the subject that we are compressing into one.

During our many times of reviewing the Copyright Act, I believe that we should work to ensure that the copyright system provides adequate incentives and fairly compensates its creators, and while we could probably hold a single hearing on each one of these topics, there are several things that should be observed as we study and review it today.

I would like witnesses to examine whether the current approach to moral rights in the United States is sufficient. Moral rights refers to non-economic rights an author may have to control their copyrighted works. American creators frequently receive moral rights protections by entering into private contracts. In 1990, Congress created the only specific moral rights provision in Title 17, enacting the Visual Artists Rights Act, which is the first Federal provision directly addressing the Berne Convention moral rights provisions.

While the VARA is the only Federal provision to deal with moral rights, it only covers visual art works, paintings, drawings, prints and sculptures. It also only covers the original copy of the work. Many courts, however, have struggled to interpret several provisions of the VARA. One of the major difficulties for the courts has been interpreting whether a work rises to the level of recognized stature to qualify for protection against any destruction. I would like to hear the witnesses discuss their thoughts about whether the

provisions of VARA are difficult to interpret, and if so, what changes might be recommended.

Additionally, the Lanham Act, has been considered an important component of the patchwork approach to moral rights in the United States; however, the Supreme Court in *Dastar Corp. v. Twentieth Century Fox Film*, limited the use of Lanham as a basis for moral rights protections. The court unanimously held that there is no Lanham Act obligation to attribute the original creator or copyright owner as the origin of works that are in public domain.

I would also like to be enlightened by some of you here whether they believe the Dastar decision has weakened the United States' protection of moral rights, and if so, what we might need to do to address this potential challenge.

Visual artists operate at a disadvantage under the copyright law relative to other artists. In the context of visual arts, moral rights concepts have led to the adoption in many countries of a resale royalty. Resale royalties allow artists to benefit from increases in the value of their works over time by granting them a percentage of the proceeds each time their work is resold. Visual artists are often less likely than other artists to share in the long-term financial success of their works. Because the United States doesn't provide a resale royalty right, United States artists are prevented from recouping any royalties generated from the resale of their work in those countries that do have the resale royalty right.

And so I commend the Ranking Member Mr. Nadler, for his leadership on this issue by his introduction of House Resolution 4103, the American Royalties Act, A-R-T, which would allow American visual artists to collect a resale royalty of 5 percent when their artwork is resold at a public auction. This bill would also allow U.S. artists to collect royalties when their works of art are sold abroad. These royalties would be distributed by visual artists collecting societies, which would be governed, of course, by regulations issued by the Copyright Office.

So, I want to listen carefully from our experts gathered here this afternoon, to have to say about increasing the rights of creators for all of the topics we will discuss today.

Creators place a high value on being able to control their own works, because these rights are personal, of course, to the creators themselves. Specifically for termination rights, we want to hear discussion of the 2010 analysis performed by the Copyright Office for a legislative change to Section 203 of Title 17, to clarify the date of execution of a grant can be no earlier than date of the creation of the work itself. Congress has yet to act on this suggestion, and we would like to find out what you think about whether or not it's time to act.

And for the issue of copyright term, I believe that the current length is appropriate, particularly in light of aspects of the law, including, for example, the fair use doctrine that mitigates the impact of any copyright term and I would like to hear whether some of you believe that any change to shorten copyright term would put the United States works at a commercial disadvantage in the European Union marketplace, which currently has a copyright term that mirrors ours.

And so it is in that spirit that I indeed welcome you here for this discussion that will take place this afternoon.

I thank the Ranking Member, the Chairman, and I yield back the balance of my time.

Mr. COBLE. I thank the gentleman.

The Chair now recognizes the distinguished gentleman from Virginia, the Chairman of the full Judiciary Committee, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman.

This afternoon, the Subcommittee continues our review of our Nation's copyright laws with a hearing on moral rights, termination rights, resale royalty, and copyright term.

The U.S. joined the Berne Convention in 1998, a full 101 years after the convention was first drafted. The U.S. Government stated at the time of exesion that a combination of several of our then existing laws met the requirements of the Berne Convention, including the Lanham Act that was said to protect the right of attribution; however, only a few years after the signing of this convention, the Supreme Court in 2003 held that the Lanham Act did not, in fact, protect the right of attribution. Most commentators have described the American moral rights system as a patchwork of laws. So as the Subcommittee continues its copyright review, we should consider whether current law is sufficient to satisfy the moral rights of our creators or, whether something more explicit is required.

Turning to the longstanding issues of termination rights and copyright term, I look forward to hearing about the impact of existing U.S. law in these areas and whether improvements can be made. Many of you know that the Register of Copyright has made several suggestions in these areas.

Finally, the Copyright Office has recently released a lengthy new report on the resale royalty issue in which it changed its position on the merits of such a right from an earlier 1992 report. Legislation has been introduced on this issue on several occasions to allow visual artists to benefit from their works similar to other creators. This is an important issue for many visual artists.

I look forward to hearing more from our witnesses today about all of these important issues.

And, again, I thank all of you for appearing before this Subcommittee this afternoon.

And I yield back to the Chairman.

Mr. COBLE. I thank the gentleman.

The Chair recognizes the distinguished gentleman from New York, the Ranking Member of this Subcommittee, Mr. Nadler.

Mr. NADLER. Thank you, Mr. Chairman.

Today we consider a broad range of existing legal protections for artists and creators, including the moral rights of attribution and integrity, the right to terminate a transfer or license of one's works under the copyright term.

Congress has taken some steps to address these issues, and I welcome the opportunity to hear from our witnesses about how our current laws are working and what, if any, changes might be necessary and appropriate.



I also welcome this chance to examine resale royalties for visual artists. To date, Congress has failed to adopt a resale royalty right, a right which would grant visual artists a percentage of the proceeds each time their work is resold. Unlike other artists, for example, songwriters and performing artists who may receive some royalties whenever their works are reproduced or performed, our visual artists currently benefit only from the original sale of their artwork. This means that the artist receives no part of the long-term financial success of the work. For example, if a young artist sells a work of art for \$500 at the beginning of his or her career and the same work is later sold for \$50,000, the original artist gets nothing. It is the purchaser, not the artist, who benefits whenever the value of the artist's work increases.

The Berne Convention, to which the United States is a signatory, makes adoption of the resale royalty right optional, but does not allow artists in any country that fails to adopt this right to benefit from resale royalties in any other country. Because we do not provide this right, American artists are prevented from recovering any royalties generated from the resale of their works in countries that have resale rights. Seventy other countries now provide resale rights, including the entire European Union.

Concerned about this lack of fairness for American artists, I have introduced a bill, H.R. 4103, the "American Royalties Too (ART) Act," clever acronym, to correct this deficiency and injustice in the law. The ART Act provides for resale royalty of 5 percent to be paid to the artist for every work of visual art sold for more than \$5,000 at public auction. The royalty would be capped at \$35,000 for works of art that sell for more than \$700,000. The royalty right is limited to works of fine art that are not created for the purpose of mass reproduction. Covered artworks include paintings, drawings, prints, sculpture, and photographs in the original embodiment or in a limited edition. Small auction houses with annual sales of less than \$1 million are exempt.

I firmly believe that the time has come for us to establish a resale royalty right here in the United States. I'm not alone in this belief. The national arts advocacy organization, the Americans for the Arts, supports this legislation. So too does the Visual Artists Rights Coalition, VARC, which includes the Artists Rights Society, the Visual Artists and Galleries Association, the American Society of Illustrators Partnership, the National Cartoonist Society, the Association of American Editorial Cartoonists, and the Association of Medical Illustrators, among others. Especially for the politicians who are Members of this Committee, beware of the wrath of the Association of National Cartoonists.

The United States Copyright Office, which once opposed adopting a resale royalty right, also now supports "congressional consideration of a resale royalty right, or *droit de suite*," and pardon my French pronunciation or non-pronunciation, "which would give artists a percentage of the amount paid for a work each time it is resold by another party."

In its report in December of last year, *Resale Royalties and Updated Analysis*, the Copyright Office observed that visual artists operate at a disadvantage relative to other artists. It also noted that many more countries had adopted resale royalty laws since its

1992 report recommending against adoption of this right, and that the adverse market effects it feared might result from resale royalty laws have not, in fact, materialized.

I welcome and look forward to hearing more from Karen Claggett, the Associate Register of Copyrights and Director of Policy and International Affairs, who is testifying on resale royalty on behalf the Copyright Office at the hearing today.

By adopting a resale royalty, the United States would join the rest of the world in recognizing this important right and because these other countries have reciprocal agreements, they would then pay U.S. artists for works resold in their countries. This would ensure that in addition to resale royalties for works resold in this country, American artists would also benefit whenever and wherever their works are sold, whether in New York or London or Paris.

Serious consideration of resale royalty right is long overdue.

And I thank Chairman Coble and Chairman Goodlatte for including this issue as part of the Subcommittee's review today of the Copyright Act.

With that, I look forward to hearing from our witnesses, and I yield back the balance of my time.

Mr. COBLE. I thank the gentleman.

We have a distinguished panel today, whom I will now introduce. If you all will please rise, and I will administer the oath of office to you.

[Witnesses sworn.]

Mr. COBLE. I thank you for that. You may be seated.

And let the record reflect that all witnesses responded in the affirmative.

Our first witness this afternoon is Ms. Karyn Temple Claggett, Associate Register of Copyrights and Director of Policy and International Affairs at the U.S. Copyright Office. In her position, Ms. Claggett advises the Register of Copyrights, Congress and Executive Branch agencies on domestic and international matters of copyright law and policy. She received her J.D. from Columbia University School of Law and her bachelor's degree from the University of Michigan. Ms. Claggett, good to have you with us.

Our second witness, Mr. Rick Carnes, President of the Songwriters Guild of America. In his position, Mr. Carnes oversees the organization's music creator and administration program. He currently serves as professor of music business and musical composition at Middle Tennessee State University, and he received his education from Memphis State University. Mr. Carnes, good to have you with us as well.

Our third witness, Mr. Casey Rae, Vice-President for Policy and Education at the Future of Music Coalition, he is also a musician, recording engineer, educator, journalist and talking head. Mr. Rae received his degree in jazz composition from the University of Maine. Mr. Rae, good to have you with us, sir.

Our fourth witness is Professor Michael Carroll, Professor of Law and Director of the Program of International Justice and Intellectual Property at the American University in Washington, Washington College of Law. Professor Carroll's research focuses on the history of copyright music and balancing intellectual property law over time in the face of new technologies. He received his J.D. from

the Georgetown University Law Center and his bachelor's from the University of Chicago. Professor, good to have you with us as well.

Our final witness is Mr. Thomas Sydnor, Visiting Fellow, at the Center of Internet, Communications and Technology Policy at the American Enterprise Institute. Prior to AEI, Mr. Sydnor served as counsel for intellectual property and technology to Chairman Orin Hatch of the Senate Judiciary Committee. He received his J.D. from Duke University School of Law and his bachelor's degree from the Ohio State University.

Mr. Sydnor, my law school is located nine miles from your law school. I will hold you harmless if you hold me harmless.

Mr. SYDNOR. I will do so.

Mr. COBLE. It can be a delicate exchange, as you know.

Good to have all of you with us. Folks, you will notice there are two timers on your desk. When the red light changes to amber, that is your warning that you have a minute to go. You won't be severely punished if you go beyond the minute, but try to keep it within the minute if you can.

Ms. Claggett, we'll let you be our leadoff hitter.

**TESTIMONY OF KARYN A. TEMPLE CLAGGETT, ASSOCIATE REGISTER OF COPYRIGHTS, DIRECTOR OF POLICY AND INTERNATIONAL AFFAIRS, U.S. COPYRIGHT OFFICE**

Ms. CLAGGETT. Thank you.

Chairman Coble, Ranking Member Nadler and Members of the Subcommittee, thank you for the opportunity to appear before you today to discuss the issue of resale royalties. The Copyright Office published an updated analysis on the subject in December 2013, our first review of the issue in more than 20 years.

In simple terms, a resale royalty gives visual artists a percentage of the proceeds when their works are resold. Internationally, resale royalty rights are included in the Berne Convention, which the United States joined in 1989. However, under Berne, these rights are optional and reciprocal, meaning that no country is required to provide resale royalties under the treaty, but if it does not, its citizens may be precluded from collecting royalties even if their art is resold in countries where the right exists.

The concept of a resale royalty develops because of the somewhat unique way in which certain visual artists are affected by the copyright system. Although visual artists, like all authors, enjoy the same exclusive rights set forth in the Copyright Act, as a practical reality, many visual artists are unable to fully benefit from exploitation of those rights.

Unlike other copyrighted works, such as books and music, which are reproduced and sold in thousands, if not millions of copies, works of fine art are typically valued for their originality and scarcity. While it is true that some visual artists may sell mainstream reproductions or adaptations of their work, for example in the form of posters, these are often not a substitute for the fine art market, and under the First Sale Doctrine, visual artists will not ordinarily control or benefit from the resale or later display of their works. This means that visual artists derive most of their compensation from that initial sale and they are often excluded from the more significant profits that their works may generate over time.

A resale royalty allows an artist to benefit from the increased value of her work. For example, if an artist initially sells a work to a collector for a hundred dollars, and over time the artist's popularity increases such that the work is later resold for, say, \$10,000, assuming a resale of 3 to 5 percent, the artist would receive \$300 to \$500 from the later sale under such a system.

Since its inception in France in 1920, many other countries around the world have enacted resale royalty rights. Currently, more than 70 countries have adopted some form of resale royalties. Several other major economies, such as Canada and China, are also considering a resale royalty. This international trend is compelling, and because of reciprocity requirements, it means American artists are often not being paid.

The Copyright Office first studied the issue of resale royalties in detail in 1992. Although we didn't recommend adoption of a resale royalty at that time, we noted that Congress might want to take another look at the issue if resale royalties were adopted throughout the European community. In 2001, the European Union did just that and harmonized resale royalty laws across Europe. We were, thus, gratified that we were asked to review the issue again by Representative Nadler and then Senator Cole.

In our more recent review, we concluded that visual artists may indeed operate at a disadvantage under the copyright law and that Congress may wish to consider resale royalty legislation to address this disparity. We highlighted the number of new countries that have enacted resale royalty laws. We also cited intervening studies failing to find demonstrated market harm in those countries with such a right. At the same time, we acknowledged that a resale royalty right is not necessarily the only or best option to address the position of visual artists under the copyright law. We also made some specific recommendations to include in any resale royalty legislations.

We were pleased that the current American Royalties Too bill adopted a number of the office's recommendations, including a relatively low price threshold for eligibility, a royalty rate that is consistent with international practice, a cap on the royalties available from each sale, and a request for further study from the Copyright Office, always a good thing.

The issue of resale royalties is that its core an issue of fundamental fairness. Should visual artists be able to receive some compensation from the substantial increases in the value of their works over time to help ensure a fair return on works that are uniquely produced. Indeed, Congress has emphasized the concept of fair return as an appropriate consideration in copyright policy.

The current termination provisions also being discussed today are specifically designed to allow all authors an opportunity to further share in the economic success of their works. These termination rights, however, may have little benefit for visual artists.

Undoubtedly, the issue of resale royalties still raises complex questions. The true benefits of a resale royalty are difficult to accurately quantify and there are concrete administrative and logistical concerns that Congress may want to consider in reviewing this issue. For that reason, we also proposed alternative options Con-

gress may wish to consider as a way to support and sustain visual artists.

We, at the Copyright Office, look forward to assisting the Subcommittee as it continues to consider this issue and during the overall process of copyright review.

Thank you.

[The testimony of Ms. Claggett follows:]

**Statement of  
Karyn A. Temple Claggett  
Associate Register of Copyrights and  
Director of Policy and International Affairs  
United States Copyright Office**

**Subcommittee on Courts, Intellectual Property and the Internet  
Committee on the Judiciary**  
United States House of Representatives, 113th Congress, 2nd Session  
July 15, 2014

**“Moral Rights, Termination Rights, Resale Royalty, and Copyright Term”**

Chairman Coble, Ranking Member Nadler, and Members of the Subcommittee, thank you for the opportunity to appear before you today to discuss the issue of resale royalties for visual artists. The Copyright Office published an analysis on the subject in December 2013, thereby updating our 1992 report for the first time. We concluded that certain visual artists, including painters, illustrators, sculptors, and photographers (hereinafter “visual artists” or “artists”)<sup>1</sup> may indeed operate at a disadvantage under the copyright law relative to other authors, and that Congress accordingly may wish to consider resale royalty legislation to address this disparity.<sup>2</sup>

## I. Introduction and Overview

The issue of resale royalties is not a new one. France was the first country to enact resale royalty legislation in 1920. In simple terms, a resale royalty, or *droit de suite* as the right is known in Europe, provides visual artists the opportunity to share in the increased values of their works by granting them a percentage of the proceeds when their works are resold. Internationally, resale royalty rights are included in Article 14*ter* of the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”),<sup>3</sup> which the United States joined in 1989.<sup>4</sup> The resale royalty provision in the Berne Convention, however, is optional and reciprocal: Member States are not required to implement resale royalty laws, but if they fail to do so their citizens may not benefit from the right in countries where it is recognized.<sup>5</sup>

A resale royalty right is typically justified by the unique way in which some visual artists are affected by the copyright system. Although visual artists, like all authors, enjoy the same exclusive rights set forth in the Copyright Act (to distribute; reproduce; publicly perform and display their works; and prepare derivative works),<sup>6</sup> as a practical reality, most artists are unable to benefit fully from exploitation of these rights.<sup>7</sup> Unlike other copyrighted works such as books and music, works

<sup>1</sup> Our report noted that if Congress were to enact a resale royalty right, it would need to define the eligible category of works, and cited the definition “work[s] of visual art” found in the Visual Artists Rights Act of 1990. See U.S. COPYRIGHT OFFICE, *RESALE ROYALTIES: AN UPDATED ANALYSIS* 1 n.2 (2013), available at <http://www.copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf> (“RESALE ROYALTIES”).

<sup>2</sup> *Id.* at 1.

<sup>3</sup> Berne Convention for the Protection of Literary and Artistic Works art. 14*ter*, Sept. 9, 1886, as revised July 24, 1971 and as amended Sept. 28, 1979, 102 Stat. 2853, 1161 U.N.T.S. 3 (entered into force in the United States Mar. 1, 1989).

<sup>4</sup> Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified in scattered sections of 17 U.S.C.); Public Notice 1086, Berne Convention and “Berne Implementation Act of 1988,” 53 Fed. Reg. 48,748 (Dec. 2, 1988) (announcing Mar. 1, 1989 entry into force).

<sup>5</sup> Berne Convention art. 14*ter* (2).

<sup>6</sup> See 17 U.S.C. § 106.

<sup>7</sup> See *RESALE ROYALTIES* at 10-11.

of fine art are typically valued for their originality and scarcity.<sup>8</sup> Many visual artists, unlike other authors, simply do not receive meaningful compensation from reproductions or distributions of copies of their works, or from the ability to create derivative works or adaptations.<sup>9</sup> A novelist and her publisher may offer millions of copies of the same book to buyers, a filmmaker may distribute millions of DVDs of a film, and a songwriter may authorize millions of downloads or streams. In each case, every purchaser receives the same work, for the same value as the original, and the author is compensated for each transaction. While some artists may successfully exploit their works through reproductions or distributions, for many others, the very nature of their visual art may limit the ability to create such markets, and the income realized from the sales of these items is not likely to approach the income that the original artwork would bring if it increases in value and is sold and later resold. This fact makes the impact of the first sale doctrine especially severe. The doctrine, which in most circumstances is an important and rational limitation on the rights of copyright owners, operates to preclude artists from sharing in the only meaningful compensation for their works—the profits from appreciation over time and downstream sales amongst collectors.<sup>10</sup>

Therefore, as a practical matter, many visual artists derive most of their compensation only from that first sale. If their work appreciates over time, under the current system, it is often third parties such as dealers, collectors, or auction houses who receive the benefit of that appreciation, rather than the artist. There are many notable examples of the inequity felt by artists from this system. France for example, began seriously to consider a resale royalty after wide circulation of a lithograph depicting impoverished children watching their father's painting being auctioned for a large sum.<sup>11</sup> Similarly, the issue of resale royalties began to receive major public attention in the United States after a well-known 1973 incident in which artist Robert Rauschenberg angrily confronted an art collector who sold Rauschenberg's painting "Thaw" for \$85,000 after having purchased it for \$900.<sup>12</sup> Resale royalties, many argue, would operate as other economic rights and provide visual artists with significant incentives for the creation of new works.<sup>13</sup>

A typical resale royalty right allows an artist to receive a certain percentage of the subsequent sales price of his or her works. For example, if an artist initially sells a work to a collector for \$100 and over time the artist's popularity increases such that the work is later resold for thousands of dollars, a resale royalty would allow the artist to recoup a small percentage (say 3%-5%) of that

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 10-11, 31-32. Under the first sale doctrine, the owner of a copyright work is generally permitted to display, sell or dispose of that work without the authorization of the creator. 17 U.S.C. § 109.

<sup>11</sup> See Carole M. Vickers, *The Applicability of the Droit de Suite in the United States*, 3 B.C. INT'L & COMP. L. REV. 433, 438 n.16 (1980).

<sup>12</sup> See Patricia Cohen, *Artists File Lawsuits, Seeking Royalties*, N.Y. TIMES, Nov. 1, 2011, [http://www.nytimes.com/2011/11/02/design/artists-file-suit-against-sothebys-christies-and-ebay.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/11/02/design/artists-file-suit-against-sothebys-christies-and-ebay.html?pagewanted=all&_r=0).

<sup>13</sup> See REALE ROYALTIES at 37-38.



resale price. Accordingly, if a work originally sells for \$100 and is later resold for \$10,000 then the artist might receive \$300 to \$500 at the time of the resale under such a system.

Since its inception in France in 1920, many countries have followed suit. Some thirty countries have adopted the right in the past twenty years.<sup>14</sup> At this time, more than seventy countries have some form of resale royalties, including the United Kingdom, France, and Germany.<sup>15</sup> At least two other major economies, Canada and China, are also seriously considering adoption of a resale royalty.<sup>16</sup> This international trend is significant for the United States in light of the Berne reciprocity issue noted above. Because our law does not provide for a resale royalty right, American visual artists are often prevented from recouping any royalties generated when their works are resold in countries that do have the right.<sup>17</sup>

## II. History and Prior Studies

In the United States, the issue of a resale royalty has been the subject of periodic interest. Through the years, several federal bills have been introduced, including legislation sponsored by Representative Waxman in 1978 and by Senator Kennedy and then-Representative Markey in the 1980s.<sup>18</sup> The Kennedy-Markey bill also provided limited moral rights of attribution and integrity to visual artists. A version of that legislation eventually was enacted as the Visual Artists Rights Act of 1990 (“VARA”),<sup>19</sup> but the resale royalty language was removed prior to the bill’s passage.

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<sup>14</sup> See *id.* at 8, 17.

<sup>15</sup> See *id.*, Appendix E.

<sup>16</sup> See *id.* at 19-20.

<sup>17</sup> See, e.g., Copyright Agency/Viscopy, Comments Submitted in Response to U.S. Copyright Office’s Sept. 19, 2012 Notice of Inquiry at 5 (Dec. 2012) (Australian rights management organizations stating that, between 2007 and 2011, works by forty-seven American artists generated sales of \$2,606,343 at Australian auctions); Design and Artists Copyright Society, Comments Submitted in Response to U.S. Copyright Office’s Sept. 19, 2012 Notice of Inquiry at 6 (Nov. 2012) (“The introduction of a resale royalty in the U.S. will have a mutually beneficial impact for both British and American artists when the Right is reciprocated. American artists and their heirs will benefit from royalties arising from the significant market in American art in the UK, and vice versa.”); European Grouping of Societies of Authors and Composers, Comments Submitted in Response to U.S. Copyright Office’s Sept. 19, 2012 Notice of Inquiry at 2 (Dec. 5, 2012) (“[B]y the recognition of the resale right, the artists in the US will benefit from the resale of their works in other countries thanks to the reciprocity principle.”); European Visual Artists, Comments Submitted in Response to U.S. Copyright Office’s Sept. 19, 2012 Notice of Inquiry at 5 (Dec. 2, 2012) (“US American artists will benefit from the resale right in all 27 countries of the EU as well as in other countries where it is successfully implemented . . .”). These and other comments submitted in response to the Office’s request are available at <http://www.copyright.gov/docs/resale royalty/comments/77lr58175/>.

<sup>18</sup> See Visual Artists’ Residual Rights Act of 1978, H.R. 11403, 95th Cong. (1978); Visual Artists Rights Amendment of 1986, S. 2796, 99th Cong. (1986); Visual Artists Rights Act of 1987, H.R. 3221, S. 1619, 100th Cong. (1987).

<sup>19</sup> Visual Artists Rights Act of 1990, tit. VI of Judicial Improvements Act of 1990, Pub. L. No. 101-650.

To date, the only law that has passed in the United States has been at the state level in California. The California Resale Royalties Act (“CRRA”), adopted by the California legislature in 1976, provides for a 5% royalty for works of fine art that are resold at a gain for at least \$1,000 where the seller resides in California or the sale takes place in California.<sup>20</sup> The seller or seller’s agent is required to pay the royalty directly to the artist, and if the artist cannot be found within ninety days, the seller must pay the royalty to the California Arts Council.<sup>21</sup> The Arts Council must continue the search for the artist for seven years, at which time, if the artist has not been located, the royalty is transferred to the Council to be used in acquiring fine art for public buildings.<sup>22</sup> In 2012, a California federal district court held the CRRA unconstitutional under the dormant Commerce Clause on the ground that it had the practical effect of controlling commerce occurring wholly outside California.<sup>23</sup> The case is currently on appeal.<sup>24</sup>

Although a federal resale royalty right has never been adopted, Congress first requested that the Copyright Office study the issue formally when it enacted VARA in 1990. VARA’s Section 608(b) directed the Office to conduct a study on the feasibility of future resale royalty legislation. In response, the Office published a report in 1992 recommending against adoption of the right at that time.<sup>25</sup> Among other factors, the Office expressed concern that such a right might be detrimental to artists who might never enjoy a viable resale market, because purchasers’ inclination to factor in future resale royalties could drive down prices for artwork in the primary market.<sup>26</sup> The Office also noted concerns that a resale royalty could adversely affect the secondary art market by diverting sales away from the United States.<sup>27</sup> And, the Office highlighted tension between a resale royalty right and the first sale doctrine, which generally permits a person who holds lawful title to a copy of a work to freely dispose of that copy.<sup>28</sup> The Office stated, however, that, “[s]hould the European Community harmonize existing *droit de suite* laws, Congress may want to take another look at the resale royalty, particularly if the Community decides to extend the royalty to all its Member

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<sup>20</sup> CAL. CIV. CODE § 986(a), (b)(2), (b)(4).

<sup>21</sup> *Id.* § 986(a)(2).

<sup>22</sup> *Id.* § 986(a)(5).

<sup>23</sup> *Estate of Graham v. Sotheby’s Inc.*, 860 F. Supp. 2d 1117, 1125 (C.D. Cal. 2012).

<sup>24</sup> *Estate of Graham v. Sotheby’s, Inc.*, No. 12-56077 (9th Cir. filed June 8, 2012).

<sup>25</sup> U.S. COPYRIGHT OFFICE, *DROIT DE SUITE: THE ARTIST’S RESALE ROYALTY* (1992), available at [http://www.copyright.gov/history/droit\\_de\\_suite.pdf](http://www.copyright.gov/history/droit_de_suite.pdf) (“1992 REPORT”).

<sup>26</sup> *Id.* at 133.

<sup>27</sup> *Id.* at 147–48.

<sup>28</sup> *Id.* at 148; see 17 U.S.C. § 109.

States.”<sup>29</sup>

### III. Current Study and Recent Developments

In 2001 the European Union did in fact extend resale royalties to all EU Member States by adopting a Directive to harmonize resale royalty laws across Europe.<sup>30</sup> The Directive required all EU Member States to implement resale royalty legislation by 2006.<sup>31</sup> Under the Directive, EU Member States are required to establish a royalty for art sales involving “art market professionals” that occur after the first transfer of the work by the author.<sup>32</sup>

In the aftermath of the EU Directive, resale royalties have again become the subject of serious consideration in the United States, and in 2011 Representative Nadler and Senator Kohl introduced the Equity for Visual Artists Act of 2011.<sup>33</sup> The following year, Representative Nadler and Senator Kohl asked the Copyright Office to follow up on its earlier pledge by re-examining the issue through an updated analysis.<sup>34</sup>

The Office’s current study began in 2012 with a Federal Register notice seeking written comments from interested parties. In response, we received nearly sixty comments from a broad range of stakeholders both in the United States and abroad. We also held a public roundtable in which members of the public were able to discuss the issues and express their views.<sup>35</sup>

The Office issued an updated analysis in December 2013, concluding that visual artists may indeed operate at a disadvantage under the copyright law relative to other authors, and that Congress accordingly may wish to consider resale royalty legislation to address the disparity.<sup>36</sup> We observed that over thirty countries have adopted resale royalty laws since the Office’s 1992 report, bringing the total number of countries recognizing the right to more than seventy.<sup>37</sup> The Office also cited

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<sup>29</sup> 1992 REPORT at 149.

<sup>30</sup> Council Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the Resale Right for the Benefit of the Author of an Original Work of Art, 2001 O.J. (L 272) 32-36, *available at* [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=180301](http://www.wipo.int/wipolex/en/text.jsp?file_id=180301).

<sup>31</sup> *Id.* art. 12(1).

<sup>32</sup> *Id.* art. 1(2).

<sup>33</sup> H.R. 3688, S. 2000, 112th Cong. (2011).

<sup>34</sup> Letter from Sen. Herb Kohl and Rep. Jerrold Nadler to Maria A. Pallante, Register of Copyrights (May 17, 2012) (reprinted in *RESALE ROYALTIES*).

<sup>35</sup> See U.S. Copyright Office, Transcript of Resale Royalty Public Roundtable (Apr. 23, 2013), <http://www.copyright.gov/docs/resaleroyalty/transcripts/0423LOC.pdf>.

<sup>36</sup> *RESALE ROYALTIES*, *supra* note 1.

<sup>37</sup> *Id.* at 8.

studies indicating that the adverse market harms that had been predicted to result from such laws had not materialized in countries that had enacted resale royalty legislation.<sup>38</sup>

At the same time, the Office did not conclude that a resale royalty right is necessarily the only or best option to address the position of visual artists. We acknowledged the fact that some studies still suggest that the bulk of resale royalty payments go to a small number of already well-established artists and that there is some question as to whether a resale royalty is the most effective means of incentivizing artist creativity.<sup>39</sup> The Office also found that any prediction about such a law's likely effect is complicated by a general lack of reliable empirical information about the operation of the art market worldwide.<sup>40</sup> The Office accordingly recommended additional deliberation to determine whether the benefits of a resale royalty law would outweigh its costs (*e.g.*, administration and enforcement).<sup>41</sup> To further assist Congress's consideration of the issue, the Office highlighted various provisions that it believes should be included in any resale royalty legislation to ensure that it benefits the greatest number of artists while minimizing any disruption in the art market.<sup>42</sup>

In February 2014, Representative Nadler and Senators Baldwin and Markey introduced an updated resale royalty bill, the American Royalties Too Act of 2014.<sup>43</sup> The legislation would establish a resale royalty for visual artworks sold at auction by a person other than the author for \$5,000 or more.<sup>44</sup> The royalty amount would be the lesser of 5% of the sale price or \$35,000, plus cost-of-living adjustments.<sup>45</sup> Royalties would be distributed by visual artists' collecting societies, which would be governed by regulations issued by the Copyright Office.<sup>46</sup> We were pleased that the bill adopted a number of the Office's recommendations, including a relatively low price threshold, a royalty rate that is consistent with international practice, a cap on the royalties available from each sale, collective management by private organizations with government oversight, and a request for further study by the Copyright Office.

Since we issued our report, several countries have initiated or continued studies on the impact of a resale royalty in their respective markets. In February 2014, stakeholders in Europe issued a document entitled "Key Principles and Recommendations on the management of the Author Resale

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<sup>38</sup> *Id.* at 2.

<sup>39</sup> *Id.* at 68-69.

<sup>40</sup> *Id.* at 26-31.

<sup>41</sup> *Id.* at 31.

<sup>42</sup> *Id.* at 73-81.

<sup>43</sup> H.R. 4103, S. 2045, 113th Cong. (2014).

<sup>44</sup> *Id.* § 3.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* §§ 3, 5.

Right” under the auspices of the EU Commissioner for Internal Market and Services, providing guidelines to improve administration and transparency in the operation of the resale right in Europe.<sup>47</sup> The United Kingdom is currently conducting an online survey to gather information about how the resale right is working in the United Kingdom and is seeking public comments, with a report expected September 2014.<sup>48</sup>

#### IV. Conclusion

The issue of resale royalties is at its core an issue of fundamental fairness. Should visual artists be able to receive some compensation from the substantial increases in the value of their works over time, to help ensure a fair return in works that are uniquely produced? Indeed, Congress has emphasized the concept of fair return as an appropriate consideration in copyright policy. For example, the current termination provisions, also being discussed today, are specifically designed to allow all authors an opportunity to share in the economic success of their works by terminating and renegotiating previous transfers of their exclusive rights under copyright law, for example, to publishers or producers.<sup>49</sup> These provisions do little for visual artists, however, because their primary (if not singular) return comes not from licensing copies to publishers but from selling the original, physical work once.

As I have discussed, there is a compelling international trend that makes U.S. review of the resale royalty right timely and important. Nonetheless, both the formulation and application remain complex questions. The true benefits of a resale royalty are difficult to accurately quantify and there are administrative and logistical concerns that would need to be carefully considered to develop a fully functioning system in the United States. For these reasons, in our analysis, we also proposed alternative or supplementary options Congress may wish to consider as a way to support and sustain visual artists, such as the encouragement, or even oversight, of voluntary initiatives and best practices among participants in the visual art market, broader public display rights for visual artists, rental rights, and increased federal grants for the arts.<sup>50</sup>

Thank you for inviting me to testify today. We at the Copyright Office look forward to assisting the Subcommittee as it continues to consider this issue and the overall process of copyright review.

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<sup>47</sup> See *Resale Right*, EUROPEAN COMMISSION, [http://ec.europa.eu/internal\\_market/copyright/resale-right/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/resale-right/index_en.htm).

<sup>48</sup> See *Artist's Resale Right*, U.K. INTELLECTUAL PROPERTY OFFICE, <http://www.ipo.gov.uk/types/copy/c-other/c-art.htm>.

<sup>49</sup> 17 U.S.C. §§ 203, 304(c), (d).

<sup>50</sup> RESALE ROYALTIES at 70-73.

Mr. COBLE. Thank you, Ms. Claggett.  
Mr. Carnes.

**TESTIMONY OF RICK CARNES, PRESIDENT,  
SONGWRITERS GUILD OF AMERICA**

Mr. CARNES. Yes. Thank you, Chairman Coble and Ranking Member Nadler for this opportunity to testify on moral rights and issues of enormous importance to American songwriters.

My name is Rick Carnes and I'm President of the Songwriters Guild of America. SGA is the Nation's oldest and largest organization run exclusively by and for songwriters and has been advocating for the rights of music creators since 1931.

Do I need to turn this up? It got turned off for some reason.

I'm a professional songwriter living and working in Nashville for over three decades. And while I've been fortunate enough to have had a modicum of success in my career, writing number one songs for Garth Brooks and Reba McEntyre, along with songs recorded by Dean Martin, Alabama and Loretta Lynn, among others, I am constantly aware of how copyright law controls my fate. More importantly, I'm concerned about the fates of my fellow music creators, many of whom, like my students at Middle Tennessee State University, are just starting out and may never have the opportunity to earn a living in their chosen professions.

I am told that the term "moral rights" is the translation from the French term *droit moral*. Pardon my French, I'm not good at that. The concept relies on the intrinsic connection between an author and his or her creations. Moral rights are not easy to define, but they are generally regarded as protecting the personal, reputational and monetary value of a work to its creator. Many songwriters think of the connection to their songs as almost familial, as if each song we write is our baby, and we hope that one day the little fellow will grow up and make a name for himself and be able to earn a living.

Throughout the world, an author is generally thought to have the moral right to control his or her work. This concept is reflected not only in national laws, but in international treaties and is part of the Universal Declaration of Human Rights, a basic restatement of natural laws to which the United States and most countries of the world are signatories. Although not specifically referred to as moral rights in the United States, the U.S. Copyright Act and other intellectual property-related statutes frequently incorporate moral rights concepts into American law.

Now, I want to, you know, express I'm not French or a lawyer, so I'm not here to define the scope or definition of moral rights in domestic or international law, how it is or should be, but what I am is a professional songwriter, and the one thing we songwriters know something about and write frequently about, is what's right and what's good and what's bad.

And first and foremost, I want to point out the bedrock of moral rights principles is that a creator has the right to control the use of something he or she has created and to receive attribution for such, and these are rights that I have personally noted are widely embraced in the American public.

SGA applauds this fact, but also notes its longstanding support for the incorporation of various free speech concepts into the U.S. Copyright Act through the Fair Use Doctrine. On that point, I simply want to stress the importance of balance. Just as we never want to inhibit the free exchange of ideas and opinions in our society, we should similarly never allow the Fair Use Doctrine to threaten to overwhelm, control attribution and economic rights of creators, whereby the exception swallows the rule of protection. The Fair Use Doctrine, in other words, should just be left alone.

In that same vein, it's axiomatic that evaluating any proposals for expanding compulsory licensing of musical works to include the use of compositions and sound recordings in compilations known as mash-ups, the current system of combining the control of rights of creators with the rights under the Fair Use Doctrine have been more than adequate in creating a licensing marketplace that addresses and satisfies the needs of copyright users, including creators of derivative works and compilations. That system does not need to be nor should it would be disturbed. Similarly, suggestions that the United States should break with the rest of the world to reduce the current term of copyright protection should just be rejected outright.

Having commented on the moral rights related areas about which the SGA asked Congress not to act, I would like to take this opportunity to reiterate SGA's past statements in staunch support of the right of termination already enshrined in U.S. copyright law.

SGA continues to believe that it is one of the most important reflections of moral rights Congress has ever included in American law. Congress has recognized that the value of musical works cannot be adequately determined at the time of their creation, and thereby, fairness and morality dictate that there must be a right of termination for creators.

Finally, I would like to note the five key principles that SGA has identified on page 5 of our written hearing statement that I strongly believe are necessary for a moral copyright system that treats songwriters with dignity and respect.

SGA truly appreciates the efforts of the Subcommittee on behalf of music creators. We look forward to working with you to revise U.S. copyright law in ways that help maintain the moral right of an essential connection between music creators and their works.

Thank you.

[The testimony of Mr. Carnes follows:]

**SONGWRITERS GUILD OF AMERICA, INC.**  
5120 Virginia Way, Suite C 22  
Brentwood, Tennessee 37027

**Written Statement of the President of the Songwriters Guild of America, Inc. ("SGA"), Rick Carnes, for the hearing record of the U.S. House of Representatives Judiciary Committee, Subcommittee on Courts, Intellectual Property and the Internet, July 15, 2014 hearing on *Moral Rights, Termination Rights, Resale Royalty, and Copyright Term*.**

**I. INTRODUCTION**

**A. SGA**

SGA is the oldest and largest U.S. national organization run exclusively by and for the creators of musical compositions and their heirs, with approximately five thousand members nationwide and over eighty years of experience in advocating for music creator rights on the federal, state and local levels. SGA's membership is comprised of songwriters, lyricists, composers and the estates of deceased members. SGA provides a variety of administrative services to its members, including contract analysis, copyright registration and renewal filings, termination rights notices, and royalty collection and auditing, to ensure that songwriters receive fair and accurate compensation for the use of their works. SGA takes great pride in its unique position as the sole, untainted representative of the interests of American and international music creators, uncompromised by the frequently conflicting views and "vertically integrated" interests of other copyright users and assignees.

**B. General Views Concerning Moral Rights and the U.S. Copyright Laws**

SGA has been asked to testify today about moral rights, among other issues. I am told that the term "moral rights" is a translation of the French term "droit moral," and refers to the ability of



authors to control the fate of their works. The concept of moral rights relies on the intrinsic connection between an author and his or her creation. Moral rights are not easy to define, but they are generally regarded as protecting the personal, reputational, and monetary value of a work to its creator.

Thus, throughout the world, an author is generally thought to have the "moral right" to control his or her work, a concept reflected not only in national laws, but in international treaties and as part of the Universal Declaration of Human Rights, a basic restatement of universal, natural laws to which the United States and most other countries of the world are signatories. Although not specifically referred to as "moral rights" in the United States, the U.S. Copyright Act and other intellectual property-related statutes frequently incorporate moral rights concepts into American law.<sup>1</sup>

Now, I want to stress that I'm not French and I'm not a lawyer, so I am not here to define what the scope or definition of moral rights in domestic and international law is or should be. But what I am is a professional songwriter who has been lucky enough to have had some modest success over a period of years, including having my songs on records that have sold close to forty million copies. And one thing we songwriters know about, and frequently write about, is right and wrong; good and bad. So SGA would like to use this opportunity to talk about what is "moral" and what is "right" as Congress is reviewing the state of copyright in the U.S., and to remind everyone of the enormous benefits to both U.S. creators and consumers that robust recognition of the general precepts of moral rights provides.

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<sup>1</sup> Moral Rights Basics, By Betsy Rosenblatt, Harvard Law School, Last Modified: March, 1998

First and foremost, I want to point out that the bedrock moral rights principles that a creator has the right to control the use of something he or she has created, and to receive attribution for such use, are rights that I have personally noted are widely embraced by the American public. SGA applauds this fact, but also notes its strong and longstanding support for the incorporation of various free speech concepts into the U.S. Copyright Act through the fair use doctrine. On that very important point, I simply want to stress the importance of balance. Just as we never want to inhibit the free exchange of ideas and opinions in our society, we should similarly never allow the fair use doctrine to threaten or overwhelm the control, attribution and economic rights of creators, whereby the exception swallows the rules of protection. Any discussion of fair use must be viewed in the context that an exception to copyright protection drawn too broadly will inevitably, to the severe detriment of society as a whole, actually serve to inhibit and diminish the marketplace of ideas by destroying the ability of professional creators to earn their living through the creation of works that richly contribute to public debate.

Moreover, SGA maintains that the current fair use guidelines set forth in Section 107 of the Copyright Act establish an excellent, flexible framework for courts to settle questions concerning the adequacy of a fair use defense in any copyright infringement action. Attempting to expand or contract the application of the fair use doctrine by anticipating the presence or absence of various, specific facts or conditions in infringement suits would not only constitute a fruitless exercise in clairvoyance, it would threaten the very delicate balance that has taken nearly two centuries to develop between the rights and interests of creators and the overall public good. The fair use doctrine, in other words, needs to be left alone.

Further in that same vein, it is axiomatic that in evaluating any proposals for expanding

compulsory licensing of musical works to include, say, the use of compositions and sound recordings in compilation works known as “mash-ups,” Congress must move equally carefully to avoid creating similar upset and unfairness in the marketplace. The current system combining the rights of control of creators with the rights under the fair use doctrine have been more than adequate in creating a licensing marketplace that addresses and satisfies the needs of copyright users (including the creators of derivative works and compilations). That system does not need to be and should not be disturbed.

Similarly, suggestions that the United States should break with the rest of the world to reduce the current term of copyright protection (designed specifically to allow creators to address the economic welfare of their families for a time period limited basically to the lives of their grandchildren) in order to stimulate “faster growth of the public domain” should be rejected outright. The U.S. Copyright Office, Congress and the United States Supreme Court have considered this issue on numerous occasions and determined that the current term of copyright protection established under Article I Section 8 of the U.S. Constitution is not only proper, but serves the dual purpose of supporting the marketplace of ideas by encouraging professional creativity *and* bolstering the U.S. economy and balance of trade as well. To reconsider this issue yet again would be an unfortunate waste of valuable, legislative time far better spent on other issues critical to improving the U.S. copyright system.

Having commented on the “moral rights” related areas about which SGA asks Congress not to act, I would now like to turn to those issues of enormous importance to the U.S. music creator community on which positive action by Congress would be enormously helpful and productive to music creators.

## II. SGA's Five Principles

SGA has identified five principles that are necessary for a “moral” copyright system that treats songwriters with dignity and respect. These are the indispensable needs for:

- (A) The establishment of a small claims venue so songwriters have a real and workable remedy when our works are stolen;
- (B) Fair market value compensation for the authorized use of musical works, including the right to terminate transfers of works after a term of years;
- (C) Complete transparency throughout the licensing, use and payment process, including the right of a music creator to affiliate and remain with the performing rights society of his or her choice;
- (D) Full and equal representation of music creator interests in the management of any organization(s) created as so-called “centralized licensing” agents; and
- (E) The establishment of a stable and secure digital marketplace in which the theft of musical works is diminished to a level at which commercial interests no longer have to compete against free, stolen goods.

### A. The Establishment of a Small Claims Venue so Songwriters have a Real and Workable Remedy when our Work is Stolen

An essential element of moral rights, and the ability of a creator to have any true hope of control over the fate of his or her work, is the ability to have a remedy when we are wronged. A right without a remedy, after all, is no real right at all. Under present U.S. law, however, creators are faced with the conundrum that in order to enforce rights against infringers, they must literally make a “federal case” of it, at an average cost of nearly a quarter million dollars in legal fees and costs. Our music publisher assignees won’t enforce the rights of individual writers in cases that

mean substantial amounts to the writer but don't rise to the magnitude of a "dot.com". As a result, creators are left on our own to suffer the unauthorized use of our works on the Internet with no reasonable means to protect ourselves against the "death by a million cuts" that results from such an unenforceable right of remuneration. Thus, SGA urges Congress as one of its highest priorities in the copyright reform process to establish a small claims venue so songwriters actually have a real and workable remedy when our works are stolen.

SGA would like to emphasize its support of the work of the U.S. Copyright Office regarding the potential development of a small claims court system to address the needs of individual music creators for an affordable means of rights enforcement. Our organization looks forward to working with the Subcommittee and the Copyright Office to further the discussion of the small claims issue as an important component of curbing the rampant problem of online infringement of musical works that has devastated the music creator community, and made it nearly impossible for songwriters to earn a living.

#### **B. Fair, Market Value Compensation for the Use of Musical Works**

SGA is in accord with the views of the Performing Rights Organizations ("PROs") and others expressing the idea that all music creators deserve fair market value for their use of their works on all platforms. Fair pay for one's labor is a basic tenant of a just society. SGA is also in agreement with the PROs and others that the governmentally imposed consent decrees to which the PROs remain subject are severely outdated, crippling the ability of the PROs to establish fair, market value rates for the performance of musical compositions in digital environments on behalf of music creators.

SGA is pleased about the U.S. Department of Justice, Antitrust Division's recent announcement that it is opening up a review of the ASCAP and BMI consent decrees. SGA strongly believes the consent decrees need to be overhauled in ways that make it possible for American and international music creators to realize fair market compensation for the use of their works, free from the artificial devaluation of royalty rates that result from strict judicial interpretation of decades-old decrees formulated for the pre-Internet and digital distribution era.

By way of example, the untenable results of recent rate-setting decisions concerning the digital music streaming company Pandora, the entire business model of which is built upon the exploitation and distribution of musical compositions at rates far below market value, stand as a stark example of the need to address the market inequities that flow from the consent decrees before further, irreparable harm is caused to the American music creator community and to American culture.

Moreover, SGA also stands side by side with its music community colleagues in support of the *Songwriter Equity Act* currently pending in before both houses of Congress (S. 2321, H.R. 4079). This Act would direct the Copyright Royalty Board to utilize the “willing buyer – willing seller” (“WBWS”) standard in setting future royalty rates pursuant to its oversight mandate under the Copyright Act. SGA believes that the WBWS formula would likely lead to far more equitable results in rate setting for the use of musical compositions, including a long overdue increase in the current statutory mechanical royalty rate. That rate has for a decade stagnated at the level of 9.1 cents per physical or digital copy made and distributed even as inflation and other devaluing factors have advanced at alarming rates.

However, we would also add that we believe that sound recording owners, as well as the creators and owners of musical compositions, deserve fair market value for their works, and the pitting of sound recording owners versus creators and owners of musical compositions is based on a false presumption that allows the distributors of music to avoid paying fair market rates for both, with songwriters and composers suffering deeply unfair financial discrimination as a result.

SGA is a founding member of the Music Creators North America coalition ("MCNA"), and as such, is pleased to announce that MCNA's "Study Concerning Fair Compensation for Music Creators in the Digital Age" will be published soon. This study, in its final stages of review by author Pierre Lalonde, will shortly be available widely on the Internet and in printed form. SGA hereby respectfully requests permission from the Subcommittee to be able to submit a copy of this study upon its publication.

As a closing thought on the issue of fair remuneration, I want to take this opportunity reiterate my past statements in staunch support of the right of termination already enshrined in U.S. copyright law. SGA was the foremost proponent for incorporation of the termination right into the Copyright Act of 1976, and continues to believe that it is one of the most important reflections of moral rights that Congress has ever incorporated into American law. Congressional recognition that the value of copyrighted works cannot be adequately determined at the time of their creation, and that therefore fairness and morality dictate there must be a right of termination for creators to ensure that they have the opportunity to realize the true value of their

works, is a concept SGA believes is on the verge of global recognition. With that in mind, SGA would like to express its active support for the principle that the rights of recording artists to terminate grants of rights in sound recordings to recording corporations (which SGA believes are not the proper subject of work for hire agreements under the U.S. Copyright Act) must be recognized as sacrosanct under law.

**C. Complete transparency throughout the licensing, use and payment process.**

For close to two decades, American music creators have been assured again and again by leaders of the technology community, members of the marketplace of copyright licensees, and by its own music publisher partners, that the great benefit of the digital age for songwriters and composers is the promise of “transparency.” The brave new world of immutable ones and zeros, it has been pledged to creators, will at last put an end to decades of obfuscation and uncertainty concerning the accurate payment and distribution of royalties. Unfortunately, these promises of full disclosure and access for creators in the tracking of copyright uses and the concomitant payment of royalties have so far gone largely, if not completely, unfulfilled. The issue of mandatory transparency concerning intellectual property licensing and transactions, in fact, is one the Subcommittee should consider as part of its review of music licensing issues. Any new or modified licensing system without a requirement of complete transparency will still leave songwriters at an impossible disadvantage.

Since the Subcommittee recently held two hearings on music licensing, SGA wishes to point out two areas of music licensing activity in the digital marketplace that currently require especially intense scrutiny if promised levels of transparency are



ever to be realized.

The first category of activity concerns the so-called “pass through” mechanical license established under section 115 of the Copyright Act (through provisions of the Digital Millennium Copyright Act), whereby mechanical licensees of music (such as record companies), holding licenses permitting the manufacture and distribution of physical copies of sound recordings embodying musical compositions, may “pass through” such licenses to digital distributors of the sound recordings. This creates a situation in which the creators and owners of musical compositions have no privity of contract with online music distribution giants such as Apple iTunes. Therefore, they must rely on sometimes adversarial record company “intermediaries” for the monitoring and payment of royalties earned via online download usage. To the knowledge of SGA, not a single royalty audit of online distributors of music by the creators and owners of musical compositions has ever taken place due to this licensing anomaly. Under such circumstances, music creators simply do not have a mechanism under which they can verify that proper monitoring and payment of royalties by online music download distributors is taking place. This manifestly unfair and opaque system should be quickly and decisively rectified.

The second category regarding the lack of transparency is even more troubling to the music creator community, as it concerns a movement away from the important tradition of collective performing rights licensing through the PROs that has benefited and given protection to the community of American music creators for over one hundred years. The trend toward direct licensing to copyright users by music publishers of performing rights in musical compositions causes grave concern to the

music creator community because of the utter lack of transparency in the direct licensing process.

Since the establishment of ASCAP in 1914, music creators in the United States have been able to rely upon the PROs for licensing, collection and distribution services in the performing rights context pursuant to a one on one relationship between each creator and his or her chosen PRO. This system has not only provided music creators with the crucial assurance that an important source of revenue will be paid directly to them by the PRO, but has also fostered the development of a robust partnership of advocacy for music creator rights between SGA and the PROs over the past eight decades.

Music publishers, however, citing the unfairly stifling effects of the consent decrees on the ability of PROs to negotiate fair market royalty rates for the performance of musical works in the digital era, have recently begun in earnest to consider following through on their announced intentions to withdraw their catalogs from the PROs and to license performing rights directly. While, as noted above, SGA fully supports efforts to revamp the consent decrees in ways that will solve the fair market royalty rate-setting problem, it cannot and does not support a solution that will allow music publishers to partially or fully withdraw their catalogs, including the rights of both American and foreign music creators from the PROs, without formal commitment to complete transparency as well as to music creators being granted the full value of their rights.

This complex issue was recently the subject of important correspondence between

SGA and its international partners in the MCNA and the European Composers and Songwriters Alliance ("ECSA") on the one hand, and the two largest PROs - ASCAP and BMI - on the other. It is SGA's firm belief that the views expressed in those written exchanges are extremely relevant and important to the Subcommittee's examination of music licensing issues. SGA has already submitted copies of this correspondence to the Subcommittee for inclusion in the hearing record in its written submission to the Subcommittee on June 10<sup>th</sup>. The content of this correspondence is self-explanatory as to the problems and issues that have arisen as a result of the accelerated movement by music publishers toward the direct licensing of performing rights.

Moreover, it should also be noted that despite announcements by some major music publishers that they may continue to utilize the services of the PROs to distribute royalties to music creators directly, even following the withdrawal of their catalogs from the PROs, not a single such publisher has announced that it intends to share with those PROs full and complete data concerning the terms of its licensing arrangements, including fees, advances and related contractual benefits. This lack of transparency will inevitably result in music creators being denied the full value for their rights. This is an issue where we may part ways with our PRO friends, in that we do not consider the "partial withdrawal" of publisher catalogs as in the best interests of songwriters, especially given the very significant problem of lack of upstream transparency.

Finally, in this regard, SGA would like to express that one of the most important moral rights of any music creator is the right to affiliate and remain with the performing

rights society of his or her choice. No transferee of copyright (whose rights are generally subject to termination by law or to other stipulations by contract) should have the unilateral right to disassociate a music creator from his or her performing rights society without specific authority of such creator, a subject about which SGA will have more to say in the immediate future.

**D. Equal representation of music creator interests in the management of “centralized licensing” organizations**

SGA looks forward to the opportunity to consider and comment upon any proposals that may be forthcoming from Congress and/or the music and recording communities for the establishment of a more streamlined, centralized and potentially combined music and sound recording licensing system. SGA can state with certainty that in considering the merits of any such proposals, it shall be guided by many of the same essential principles that it expressed in 2006 regarding the consideration of the “SIRA” legislation. These include the *sine qua non* for music creator community support, namely the need for equal creator representation on the governing boards and any dispute resolution bodies of any designated licensing agent or agents. In addition, SGA will insist that prohibitions against the surrender of rights of creators through “letters of direction” will be included in any proposals. This will ensure that the rights granted to creators are not easily vitiated by the imposition of marketplace pressures by copyright administrators in inevitably superior bargaining positions. There are other essential components of any licensing systems, including a bar against unchecked spending authority by any designated agent or agents; transparency in providing data (at no or minimal cost) to

songwriters about collections and disbursements; timely distribution of royalties; and fair distribution to creators of unclaimed funds. SGA would welcome the opportunity to comment on these issues in the future.

**E. Establishment of a stable and secure digital marketplace where the theft of musical works is diminished to a level at which commercial interests no longer have to compete against “free”**

The looting of musical works on the Internet has continued nearly unabated over almost two decades, during which time the income of the music and recording industries (and especially of individual music creators and recording artists) have been diminished by as much as two-thirds. A basic sense of justice, as well as the moral rights that connect a creator to his or her work, require addressing the drastic need to curtail online digital theft of musical works.

Moreover, accepting the notion that licensed music distributors and services must be permitted to artificially depress royalty payments because they must compete against black market free goods stands the principles of moral rights, fairness and the sanctity of property ownership on their heads. In considering the viability of any potential licensing solutions considered by the Subcommittee, there must be recognition that unless additional systems and laws are put in place to control or eliminate theft, no licensing scheme can possibly address the royalty needs of the music creator community.

**V. CONCLUSION**

SGA applauds the Subcommittee's efforts to examine moral rights and to consider the individual creators innate connection to his or her work. We look forward to working with the Subcommittee in helping to shape a "moral" future in which the rights and incomes of music creators are fairly and equitably protected.

July 15, 2014

Mr. COBLE. Thank you, Mr. Carnes.  
Mr. Rae.

**TESTIMONY OF CASEY RAE, VICE PRESIDENT FOR POLICY  
AND EDUCATION, FUTURE OF MUSIC COALITION**

Mr. RAE. Members of the Subcommittee, it's an honor to appear before you today to offer my perspectives on copyright issues that impact creators and the public.

My name is Casey Rae and I'm the Vice-President for Policy and Education at Future of Music Coalition, a national non-profit education and research organization for musicians. In addition to my work in artist advocacy, I'm also a musician and I teach a course at Georgetown University on music technology and policy, so music is my life and it always has been.

One of my earliest memories is drumming along on the side of a crib to Bee Gees records. I do wish it was something cooler, but you guys just put me under oath, so I have to tell you the truth.

Most of my friends and peers are musicians, and those who aren't, probably wish they were. It's a colorful crowd that encompasses pretty much every view under the sun, personal, political and otherwise, so I feel very privileged that my job here in Washington is to help advance the artist's perspective, where it's crucial that those voices are heard.

For 14 years my organization, Future of Music Coalition, has observed the changes to traditional industry business models, helping artists understand how policy and marketplace developments affect their livelihoods.

On copyright issues, we tend to be pragmatic. We believe that musicians and songwriters should have a choice in how they exploit their copyrights, as well as the ability to reach audiences and take part in emerging innovations. Musicians are not a monolithic group, but my own experiences as part of this community have given me a sense as far as what's at stake on some of the issues you're considering today.

I'd like to talk for a minute about termination rights. There is no question that termination rights, that musicians, songwriters, composers are eligible to terminate grants transferred after 35 years under Section 203. Unfortunately, this statutory right is often muddled by major labels that want us to believe that sound recordings are somehow not part of the provisions that Congress laid out in 1976. While it's true that the act exempts certain categories of works, it's absurd to think that Congress intended to exclude recording artists from this fundamental right. It's my view and also the view of the great many artist advocates, legal professionals and copyright scholars that Section 203 applies to all expressive works and authors. Current statute allows creators to file to reclaim their copyrights, and that right is important to maintain.

At FMC, we think that artists should be empowered to make informed choices, so we've tried to demystify the termination process, but the important thing to remember here is that these are fundamental artist rights, and they're crucial rights, not just for today's artists, but for those yet to come.

Termination rights allow us to have another bite at the apple even if we end up regranting our rights to a label, publisher or another entity. Artists may have more leverage than they did at the time when they first signed, and using that leverage, we can negotiate more favorable deals or recapture ownership for the purposes of licensing directly.

These rights are especially important today, given the evolution of the marketplace. For example, we now have an expanded range of licensing opportunities and uses that are still on the horizon. One huge development is the ability to sell music directly to fans. As an artist, I want to be able to participate directly in revenue streams generated from the use of my work, and that's something I hear from other creators as well. Termination rights are part of our leverage and help ensure that we receive fair compensation.

I've heard the major labels' arguments that sound recordings are not eligible for rights recapture, and they simply don't pass muster. If an artist is an employee, why aren't they provided with a retirement package or health insurance benefits like executives or even office assistants?

It's important for those who make a monetary investment in creativity to have an opportunity to gain a return on that investment, but a grant of copyright isn't the only way for that to happen. Today's artists aren't under an obligation to transfer their rights as a condition of entering the marketplace. I'm encouraged by new partnerships between artists and companies, sometimes labels, that don't involve copyright transfer, but instead employ limited licensing or other arrangements. That said, if a full grant of copyright makes sense for an artist to achieve their goals, more power to them, but they must be able to benefit directly at a later point in the life of that copyright, and Congress has decided that that point is after 35 years.

There's two things that Congress can do here: first, make it plain that sound recordings are unambiguously eligible to termination; second, ensure that termination rights aren't undermined in international treaty agreements like the Trans-Pacific Partnership.

I'd now like to very quickly touch on two other issues before the Committee. Copyright terms are an ongoing topic of debate. That said, the Supreme Court did make its call, and we have life plus 70; one reason is that the international community was trending in that direction, and we obviously want other countries to respect and honor our copyrights.

I also believe that it's important for statutory errors to benefit from the creative labors of their loved ones, but I don't feel that terms should be extended any further; however, Congress might want to consider new proposals, for example, U.S. Register of Copyrights, Maria Pallante, recently offered a proposal that would involve a re-registration after 50 years. Perhaps there could be a provision in which if the copyright owner doesn't come forward to re-register, the author has the opportunity to do so before that work enters the public domain.

Lastly, moral rights are tricky. Artists in America definitely embrace free speech traditions and fair use, because they allow us to freely and creatively express ourselves, but I can say the attribution, as part of a moral rights package, is something that's supported by



every artist that I've ever spoken to, so if Congress can help with attribution, the creative community would likely respond favorably.

Once again I thank the Committee for the opportunity to share my views and those of Future of Music Coalition and our allies. I'd be happy to answer any questions that you might have.

[The testimony of Mr. Rae follows:]

**Written  
Testimony of  
Casey Rae  
VP for Policy and Education  
Future of Music Coalition**

**In the  
“Moral Rights, Termination Rights, Resale  
Royalty and Copyright Term ”  
Hearing**

**House Subcommittee on Courts, Intellectual  
Property and the Internet**

**July 15, 2014**

Members of the committee, it is a privilege to appear before you today to offer my perspectives on copyright issues that impact creators and the public.

My name is Casey Rae, and I am the Vice President for Policy and Education at Future of Music Coalition—a national nonprofit education, research and advocacy organization for musicians. I am also a musician, songwriter, recording engineer, journalist and educator. In addition to my work in artist advocacy, I teach a course in media, technology and policy at Georgetown University. Music is my life, and always has been. One of my earliest memories is drumming on the side of my crib to the Bee Gees. (I wish I could say it was something cooler, but I'm under oath.) Most of my friends and peers are musicians, and those that aren't probably wish they were. It's a colorful crowd that encompasses pretty much every view under the sun—personal, political and otherwise. I feel very privileged that my job here in Washington is to help advance the artist perspective where it's crucial that these voices are heard.

For 14 years, Future of Music Coalition has observed changes to traditional industry business models, helping artists to better understand how policy and marketplace developments affect their livelihoods. Our organization is part of a broad range of conversations, from preserving a level online playing field for musicians to research into artist revenue streams, to our annual Policy Summit here in DC. On matters relating to copyright, we tend to be pragmatic. We believe that musicians and songwriters should have a choice in how they exploit their copyrights, as well the ability to reach audiences and take part in emerging innovations. Musicians are not a monolithic group, but my own experiences as part of this community have given me a sense of what's at stake for artists on the issues before you today.

### **1. Termination rights under Section 203**

First, I would like to address termination rights. There should be no question that recording artists, songwriters and composers are eligible to terminate transferred

copyrights after 35 years under Section 203. Unfortunately, this statutory right is often obfuscated by major labels that want us to believe that sound recordings are somehow not part of the provisions laid out by Congress in the 1976 Act. While it is true that the Act exempts certain categories of works, it is absurd to think that Congress intended to exclude recording artists from this fundamental right. It is my view, and also the view of a great many artist advocates, legal professionals and copyright scholars, that Section 203 applies to all expressive works and authors. Current statute allows creators to file to reclaim their copyrights, and this is important to maintain.

## **2. Termination rights provide artists with leverage**

At Future of Music Coalition, we spend a great deal of time helping musicians and composers understand how things work on a practical level. Our efforts around termination rights have included not only translations of ongoing policy and legal developments, but also basic guidance into how to file an intent to terminate. We believe that artists should be empowered to make informed choices, and to that extent, we try to demystify what can be a pretty confusing process. But the important thing to remember here is that these are fundamental artist rights. And they are crucial rights—not just for yesterday’s artists, also but for those yet to come.

Termination rights allow creators to have another bite at the apple, even if they end up re-granting their rights to a label, publisher or another entity. Artists may have more leverage than they did at the time that they first signed, and using that leverage, they can negotiate more favorable deals or recapture ownership for the purpose of licensing directly.

These rights are especially important given the evolution of the marketplace. For example, we now have console and online video games; a range of synch license opportunities; new modes of advertising and uses that are still on the horizon. One huge development is ability to sell music directly to fans without the high barriers to entry common to earlier eras. As an artist, I want to be able to directly participate in revenue streams generated from the use of my work, and that’s something I hear from other artists

as well. Termination rights are part of our leverage and help to ensure that we receive fair compensation.

I have heard the labels' arguments about sound recordings being ineligible for rights recapture, and they don't pass muster. While it may be true that some sound recordings were created under conditions that *might* not involve a grant, the overwhelming majority are transfers. If an artist is an employee, why aren't they provided a retirement package and health insurance like the executives or even the office assistant?

It is important for those who make a monetary investment in creativity to have an opportunity to get a return on that investment. But a grant of copyright isn't the only way for that to happen. Today's artists aren't under an obligation to transfer their rights as a condition of entering the marketplace. I am encouraged by new partnerships between artists and companies that don't involve copyright transfer, but rather rely on limited licensing or other arrangements. These might be independent labels, publishers or even partners that haven't been a part of the historic music industry. That said, if a full grant of copyright makes sense for an artist to achieve their goals, more power to them. But they must be able to benefit directly at a later point in the life of a copyright. Congress has decided that point is after 35 years.

On the musical works side, there have been many successful terminations, even under the 56-year terms of the previous Act. There will be instances where courts have to make the ultimate call based in a review of the facts, but from a Congressional perspective, this shouldn't change the need to retain termination rights in Section 203.

There are two things Congress can do here. First, make it plain that sound recordings are eligible for termination. Second, ensure that termination rights aren't undermined in international agreements like the Trans Pacific Partnership.

I would now like to quickly touch two other issues before the committee.

**3. Copyright term length and re-registration**

Copyright terms continue to be controversial. That said, the Supreme Court made its call, and we have life plus 70. One reason for the previous extension may have been because the international community was heading in that direction and we needed to ensure that other countries would follow through with royalty obligations and enforcement. I believe that it's important for statutory heirs to benefit from the creative labors of their loved ones. But I don't feel that terms should be extended any further. Further extending terms would worsen the perception that copyright law primarily serves huge corporations, which diminishes respect for the entire enterprise of copyright, encouraging undesirable behaviors. In actuality, copyright is one of the more important tools that small-scale creators have to protect themselves against unwelcome exploitation.

Given the current life of copyright, it is that much more important that musicians and songwriters have another bite at the apple. Congress may also want to consider new proposals. For example, US Register of Copyrights Maria Pallante recently proposed a possible re-registration requirement after 50 years. Perhaps there could be a provision in which, if the copyright owner doesn't re-register, the author has an opportunity to do so before the work enters the public domain.

Comprehensive ownership registries could lessen many problems we've encountered since the 1976 Act was passed. The tremendous consolidation in the recorded music industry necessitates a better accounting about who owns what. This would aid in artist compensation under existing terms as well as rights recapture and renegotiation.

**4. Moral rights**

Lastly, we have moral rights. I am aware that we are already under some obligation to observe moral rights due to global treaties. Our own copyright landscape looks a bit different. Artists embrace America's free speech traditions because they enable us to freely and creatively express ourselves. But I can say that attribution is something that is

Testimony of Future of Music Coalition

July 15, 2014

supported by every artist to whom I've spoken. So if Congress can help with attribution, the creative community would likely respond favorably.

Once again, I thank the committee for the opportunity to share my views and those of Future of Music Coalition and our artist allies. I would be happy to answer any questions you might have to the best of my ability here today, or in a follow-up written response.

Casey Rae  
VP for Policy and Education  
Future of Music Coalition  
1615 L ST NW Suite 520  
Washington, DC 20036

Mr. COBLE. Thank you, Mr. Rae.  
Professor Carroll.

**TESTIMONY OF MICHAEL W. CARROLL, PROFESSOR OF LAW,  
AND DIRECTOR, PROGRAM ON INFORMATION JUSTICE AND  
INTELLECTUAL PROPERTY, AMERICAN UNIVERSITY WASH-  
INGTON COLLEGE OF LAW, AND THE PUBLIC LEAD OF CRE-  
ATIVE COMMONS USA**

Mr. CARROLL. Thank you, Mr. Chairman, Ranking Member Nadler and Members of the Subcommittee for inviting me to participate in this hearing.

My name is Michael Carroll. I'm a law professor at American University, Washington College of Law. I'm also on the board of directors of a non-profit organization called Creative Commons, and I'm the lead of Creative Commons U.S.A., which is the United States chapter, if you will, for the organization.

I want to make a few remarks about Creative Commons and then about the copyright term. Creative Commons was founded on the proposition that one size does not fit all. We've heard a little bit already about creators, but copyright is an automatic right applied to every work of authorship, and authors come in all shapes and sizes and are motivated by a variety of motivations.

What Creative Commons did is create six copyright licenses that any creator can use to share their works with the public. The sharing is royalty free, but it is subject to certain conditions and in those conditions, we've learned a little bit that touch on some of the issues in the hearing today.

So one of the issues is creators want attribution. So even the most liberal of the Creative Commons licenses still require that you give the creator attribution as they direct.

Other conditions can include the requirement that you share alike any derivative works that are created or that you can't create derivative works or that you limit your uses to non-derivative works.

As you surf the internet, I will find more than 500 million works subject to these licenses. Every time you visit Wikipedia, you are experiencing a Creative Commons licensed work of authorship, which is the product of multiple different authors, motivated more by the desire for attribution than they are for compensation.

We also have a little experience with the termination of transfer rule. Many authors would like to reclaim their copyrights, not for the purpose of compensation, but to make them available on the internet and those authors face an administrative gauntlet when they try to terminate their rights. And when they get to the end of that, they have to pay a filing fee of \$105 for every work of authorship, or if they package it, a little bit less than the Copyright Office. And we'd ask whether the Subcommittee would consider a proposition that would waive that for the purpose of an author who wishes to share their work publicly rather than to try to monetize it.

Finally, with respect to the copyright term, as I'll mention in a minute, the copyright term is far too long and some copyright owners feel like they want the option to get out of the copyright sys-



tem. We created a copyright waiver called CC0, that allows the copyright owner to give up their copyright.

I would say that there is some question that some people have under U.S. law about whether one can truly dedicate the copyrighted work to the public domain or whether it is merely a transfer that is subject to the termination right. It would be very helpful if the Subcommittee would take up a measure that would clarify that a copyright owner has the right to permanently dedicate the copyrighted work to the public domain in advance of the expiration of copyright.

Finally, with respect to the term of copyright, copyrights have to expire. The constitution says so. Congress's power to grant the exclusive right to authors in their writings is for a limited time. That limited time currently lasts for the life of the author plus 70 years. From an economic perspective, to promote the progress of science means to provide a sufficient incentive for both the creator and the investors in the creative process to make a fair return on that investment. Life plus 70 is far longer than necessary to achieve that goal, and all of—the brief of the five Nobel laureate economists submitted in the *Eldred v. Reno* case in the Supreme Court makes this clear. For the purpose of brevity, I adopt my—I incorporate by reference the entirety of Justice Breyer's dissenting opinion in that case, which lays out all of the reasons why copyright term is too long.

As a practical matter, there are reasons why shortening the term may be difficult, but Representative Lofgren in 2003 and then again in 2005 offered a middle ground solution called the Public Domain Enhancement Act, which is what my co-panelist, Mr. Rae, was referring to that Maria Pallante supported. The idea is that after life plus 50, if the copyright owner still wants those last years of protection, they have to show us that they care. So just register. Just pay a dollar to the Copyright Office and Register, and you can get the remainder of the term. That would be compliant with international law, but it would put more works into the public domain quicker and so we'd get a little bit more of the balance.

And with that, I conclude. Thank you very much for the opportunity to address this Subcommittee.

[The testimony of Mr. Carroll follows:]

**Statement of**

**Michael W. Carroll**

**Professor of Law,**

**Director of the Program on Information Justice and Intellectual Property,**

**American University Washington College of Law**

**and the Public Lead of Creative Commons USA**

**on “Moral Rights, Termination Rights, Resale Royalty, and Copyright Term”**

**Subcommittee on Courts, Intellectual Property, and the Internet**

**Committee on the Judiciary, U.S. House of Representatives**

**July 15, 2014**

**Statement of**  
**Michael W. Carroll**  
**Professor of Law, Director of the Program on Information Justice and**  
**Intellectual Property, American University Washington College of Law and the**  
**Public Lead of Creative Commons USA**  
**on “Moral Rights, Termination Rights, Resale Royalty, and Copyright Term”**  
**Subcommittee on Courts, Intellectual Property, and the Internet**  
**Committee on the Judiciary, U.S. House of Representatives**

**July 15, 2014**

**Introduction**

Chairman Coble, Ranking Member Nadler, Chairman Goodlatte, Ranking Member Conyers, and members of the Subcommittee, my name is Michael Carroll, and I am a member of the faculty at American University Washington College of Law, where I direct the Program on Information Justice and Intellectual Property and serve as the Public Lead for Creative Commons USA. Creative Commons USA is the United States’ project that works under the terms of an agreement with Creative Commons, Inc., a global non-profit corporation headquartered in California. Creative Commons has agreements with projects in more than 70 countries through which the local project is authorized to represent Creative Commons at the national

level. Creative Commons and Creative Commons USA have some experiences and legal tools that are relevant to the topics of today's hearing. Briefly, these are:

**Creative Commons and Moral Rights**

Creative Commons provides the public with a range of legal tools designed to promote the legal sharing and reuse of works of authorship. Creative Commons offers six standardized copyright licenses that a copyright owner can choose to grant the public permission for royalty-free use subject to a range of conditions. *See* <https://creativecommons.org/licenses/> and Appendix A.

These licenses are recognized as the global standard for sharing works and are used by Wikipedia, open access journal publishers, creators of open courseware and open educational resources, bloggers, photographers, musicians, filmmakers, and every other kind of creator imaginable. There are at least 500 million copyrighted works available under one of these Creative Commons licenses.

Users of Creative Commons licenses require attribution in exchange for permission to use their works of authorship, and this license term overlaps the moral right of attribution. The licensor waives the remainder of her moral rights to the extent allowed under national law. Originally, the suite of Creative Commons licenses treated attribution as an optional term. However, when data showed that more than 98% of license adopters opted for the attribution requirement, Creative Commons made attribution a required term of all six licenses. Other conditions that

can be imposed are restricting use to non-commercial use, requiring that any derivative works produced from the licensed work are licensed under the same terms (the “Share Alike” term), or that the work can be shared but not modified. A more detailed explanation of these licenses is attached as Appendix A.

In the experience of Creative Commons, creators have a strong interest in receiving attribution for their work, and this interest in some cases is more important to the creator than any interest in profit or compensation. If Congress were to consider creating an exclusive right of attribution, doing so would be more difficult than may appear at first glance. A quick summary of the kinds of issues that have arisen in the Creative Commons experience include what is the threshold creative contribution that must be made to receive an attribution right, how should attribution be given for works created in iterative and group settings, and must the attributing party specify who contributed what elements of the work of authorship when giving attribution? These issues suggest that as strong as the attribution interest is, proper attribution is a contextual matter.

#### ***Creative Commons and Copyright Term***

Creative Commons also provides two tools directly related to the term of copyright. One is the CC0 (pronounced CC Zero) tool that enables copyright owners to effectively shorten the term of protection for their work by dedicating their copyright to the public domain. *See*

<http://creativecommons.org/publicdomain/zero/1.0/>. The other is the Public

Domain Mark, which is just a label that enables members of the public to mark works as having the full range of reuse freedom that comes when a work enters the public domain. See <http://creativecommons.org/publicdomain/mark/1.0/>

CC0 has been used in a number of contexts, such as by a repository of public domain clipart, by creators of scientific databases, and by public bodies in countries that extend copyright to government works.

#### ***Creative Commons and the Termination Right***

Exercising the termination right is overly cumbersome and confusing to many authors and their heirs. Creative Commons created and hosts an Internet based tool still in its beta version that provides those with a potential termination right a means of assessing whether and when they may exercise their termination rights. See <http://labs.creativecommons.org/demos/termination/>

Creative Commons did this to aid authors or heirs seeking to reclaim their copyrights for the purpose of sharing their works through a CC license. In that regard, one obstacle is financial. Even after an author or heir has run the administrative gantlet, termination is not effective until they pay the Copyright Office recordation fee of a minimum of \$105 for one transaction and one title. See U.S. Copyright Office, Calculating Fees for Recording Documents and Notices of Termination in the Copyright Office at <http://www.copyright.gov/fls/sl4d.pdf>. While modest for economically valuable copyrights like those in a character such as

Superman, this recordation fee is potentially cost prohibitive for scholars, journalists, or others who have created and published many copyrighted works that they would like to share with the public through a Creative Commons license.

Creative Commons USA recommends that the Subcommittee consider a measure that would waive the recordation fee in cases in which the terminating party seeks to reclaim copyright for the purposes of making the work of authorship freely available over the Internet under the terms of an open license.

With this background, I now turn to the issue of copyright term that I was invited to address.

### **The Term of Copyright Is Too Long**

From the public's perspective, copyright is a trade-off. It provides incentives for investors to supply funds for creative endeavors and for some professional creators to create new works. But, copyright restrains freedom of expression and serves as a tax on the cost of purchasing educational, entertainment, and related expressive works. As the English parliamentarian Thomas Macauley recognized long ago, lengthening the term of copyright is economically equivalent to passing a tax increase: "The principle of copyright is this. It is a tax on readers for the purpose of giving a bounty to writers."<sup>1</sup>

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<sup>1</sup> Thomas Babington Macauley, Speech of 5 February 1841, in MACAULAY, PROSE AND POETRY (G.M. Young, ed. Harvard U. Press 1967), *available at* <http://homepages.law.asu.edu/~dkarjala/opposingcopyrightextension/commentary/MacaulaySpeeches.html>

Focusing on the economic effects of copyright, the issue of copyright term is a question of how long the public should have to pay the copyright tax for any given creative work. The general economic principle is that the term should be no longer than necessary to induce enough creators and enough investors to devote their efforts to creating and distributing new works of authorship. Recognizing this trade-off, the Founders, when granting Congress the power to create copyright law, also required that copyrights expire. Congress has specific power to enact copyright law for the purpose of “promot[ing] the progress of science and useful arts,” subject to the condition that the “exclusive right” that Congress gives to authors in their “writings” be only “for limited times.” U.S. Const., art. I, § 8, cl. 8.

Under current law, copyright lasts for the life of the author plus another 70 years, or in the case of works made for hire, 120 years from the date of creation or 95 years from the date of publication.<sup>2</sup> As a group of leading economists, including five Nobel laureates, have shown this term is too long to serve copyright’s purposes because for all intents and purposes it is virtually equivalent to a perpetual term.<sup>3</sup> The proper time horizon for copyright is one that provides a meaningful incentive for creators and investors to create *new* works. As these economists explained, profits that might be had many decades after an author is deceased are worth less

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<sup>2</sup> See 17 U.S.C. § 302; see also U.S. Copyright Office Circular 15A, Copyright Duration, <http://www.copyright.gov/circs/circ15a.pdf>.

<sup>3</sup> See *Eldred v. Reno*, 537 U.S. 186 (2003), Brief for George A. Akerlof et al. as *amici curiae*; see also *id.* at 267-69 (Breyer, J., dissenting) (appendix setting forth detailed explanation for why a life+70 term is too long from an economic perspective).



than pennies on the dollar today and therefore cannot be said to be doing any work in promoting the progress of science and useful arts.

This is a problem. There are three kinds of actions that Congress should consider to remedy this problem, or at least, not make it worse:

- (1) Shorten the term
- (2) Refuse to lengthen the term any further
- (3) Require registration with the Copyright Office to enjoy the final 20 years of protection

#### **A Shorter Term in the American Tradition**

Ideally, Congress would reclaim the American tradition on copyright term and substantially reduce it, if the United States' international copyright relations were not an issue. A good benchmark for doing so would be to consider reverting copyright term back to what it was prior enactment of the Copyright Act of 1976: an initial term of 28 years that could be renewed for another 28 years.

This policy had two beneficial features. First, the term of protection was relatively easy to determine because it was based on a work's date of publication. Second, the renewal requirement acted as a beneficial filter. Works that retained economic value after the first 28 years of protection had their copyrights renewed. Those that did not – and this was the majority of registered copyrighted works – were not renewed and went into the public domain.

However, our international copyright relations are a valid consideration that influences policy on copyright term. Congress lengthened the term in the 1976 Act with an eye toward one day joining the Berne Convention, a treaty of European origin reflecting the European model that, among other things, measured the term of protection by the life of the author plus 50 years. Joining the Berne Convention would confer some benefits on some American authors, but it would do so by imposing an increase in the copyright tax on the American public. Congress then passed a copyright tax increase in 1998 when it enacted the Sonny Bono Copyright Term Extension Act of 1998, Tit. I, Pub. L. No. 105-298, 112 Stat. 2827 (Oct. 27, 1998), which extended the term of copyrights both prospectively and retrospectively for an additional 20 years.

Extending the term of existing copyrights was the basis for a constitutional challenge in the Supreme Court on the basis that doing so violated the free speech rights of the public and violated the principles of limited government because the Constitution authorizes Congress to grant copyrights only for “limited times,” and retrospective extensions of term are a means of granting, in the words of my colleague Peter Jaszi, a perpetual term “on the installment plan.” Over two vigorous dissents, the Court rejected this argument, deciding that Congress had the power to extend copyright’s term. *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

### **No More Extensions**

At a minimum, Congress should not lengthen the term of copyright any further. The Court in *Eldred* posed the constitutional question as whether Congress had a rational basis for extending the term of copyright for an additional 20 years. But even a rational basis does not make term extension good policy. For all of the reasons expressed in Justice Breyer's dissenting opinion in *Eldred*, 537 U.S. at 242, which I hereby incorporate by reference, extending the term of copyright imposes a series of harms on the public that are not justified by any offsetting benefits.

Specifically, there is no incentive based support for term extension. *See Eldred*, 537 U.S. at 256-57 (Breyer, J., dissenting). Term extension did not provide the claimed benefits of uniformity, and going forward this argument would be without basis because we already have acquiesced in the European version of copyright term. And, arguments about longer lifespans actually undermine the case for any term extension rather than supporting it. *See id.* at 263.

I should also note that the public has become much more aware of the costs of overly long copyrights than it was in 1998. The problem of orphan works has become exacerbated, and it frustrates the ability of those who would make older copyrighted works available over the Internet to do so. Were Congress to entertain proposals to extend the term of copyright, it should expect vigorous opposition. As evidence, consider the open letter that opposes the United States' proposal to include in the Trans Pacific Partnership Agreement a term requiring all parties to

extend their terms to life + 70. The letter was signed six days ago on July 9, 2014, by a broad coalition of creators and users of copyrighted works organized by the Electronic Frontier Foundation that was sent to negotiators working on the *See* [https://www.eff.org/files/2014/07/08/copyrightterm\\_tppletter\\_print-fnl.pdf](https://www.eff.org/files/2014/07/08/copyrightterm_tppletter_print-fnl.pdf)

**A Middle Ground – the Public Domain Enhancement Act**

As a middle ground between the American tradition of fixed copyright terms, and the European model of life of the author plus a number of years, I would support the reintroduction of the Public Domain Enhancement Act. First co-sponsored by Representative Lofgren and Doolittle in 2003, H.R. 2601, 108<sup>th</sup> Cong., and then reintroduced in 2005, H.R. 2408, 109<sup>th</sup> Cong., the bill in its last form would have required that for works first published in the United States, after the term of the life of the author plus 50 years had passed, the copyright owner seeking the next 10 years of protection up to the maximum term would have to renew the copyright by paying \$1 and filing the requisite paperwork with the U.S. Copyright Office. Register of Copyrights Maria Pallante spoke in favor of this proposal when she testified before this Subcommittee. This proposal complies with the United States' international obligations while also addressing the costs of an overly long copyright term by asking copyright owners to signal that they still value copyright protection by renewing it at a more than reasonable cost.

Thank you.

## Appendix A

### Creative Commons Licenses

#### License design and rationale

All Creative Commons licenses have many important features in common. Every license helps creators — we call them licensors if they use our tools — retain copyright while allowing others to copy, distribute, and make some uses of their work — at least non-commercially. Every Creative Commons license also ensures licensors get the credit for their work they deserve. Every Creative Commons license works around the world and lasts as long as applicable copyright lasts (because they are built on copyright). These common features serve as the baseline, on top of which licensors can choose to grant additional permissions when deciding how they want their work to be used.

A Creative Commons licensor answers a few simple questions on the path to choosing a license — first, do I want to allow commercial use or not, and then second, do I want to allow derivative works or not? If a licensor decides to allow derivative works, she may also choose to require that anyone who uses the work — we call them licensees — to make that new work available under the same license terms. We call this idea “ShareAlike” and it is one of the mechanisms that (if chosen) helps the digital commons grow over time. ShareAlike is inspired by the GNU General Public License, used by many free and open source software projects.

Our licenses do not affect freedoms that the law grants to users of creative works otherwise protected by copyright, such as exceptions and limitations to copyright law like fair dealing. Creative Commons licenses require licensees to get permission to do any of the things with a work that the law reserves exclusively to a licensor and that the license does not expressly allow. Licensees must credit the licensor, keep copyright notices intact on all copies of the work, and link to the license from copies of the work. Licensees cannot use technological measures to restrict access to the work by others.

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#### Three “Layers” Of Licenses

##### Machine Readable

##### Human Readable

##### Legal Code

Our public copyright licenses incorporate a unique and innovative “three-layer” design. Each license begins as a traditional legal tool, in the kind of language and text formats that most lawyers know and love. We call this the Legal Code layer of each license.

But since most creators, educators, and scientists are not in fact lawyers, we also make the licenses available in a format that normal people can read — the Commons Deed (also known as the “human readable” version of the license). The Commons Deed is a handy reference for licensors and licensees, summarizing and expressing some of the most important terms and conditions. Think of the Commons Deed as a user-friendly interface to the Legal Code beneath, although the Deed itself is not a license, and its contents are not part of the Legal Code itself.

The final layer of the license design recognizes that software, from search engines to office productivity to music editing, plays an enormous role in the creation, copying, discovery, and distribution of works. In order to make it easy for the Web to know when a work is available under a Creative Commons license, we provide a “machine readable” version of the license — a summary of the key freedoms and obligations written into a format that software systems, search engines, and other kinds of technology can understand. We developed a standardized way to describe licenses that software can understand called [CC Rights Expression Language](#) (CC REL) to accomplish this.

Searching for open content is an important function enabled by our approach. You can use [Google](#) to search for Creative Commons content, look for pictures at [Flickr](#), albums at [Jamendo](#), and general media at [spinxpress](#). The [Wikimedia Commons](#), the multimedia repository of [Wikipedia](#), is a core user of our licenses as well.

Taken together, these three layers of licenses ensure that the spectrum of rights isn’t just a legal concept. It’s something that the creators of works can understand, their users can understand, and even the Web itself can understand.

## The Licenses



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Mr. COBLE. Thank you, Professor.

Mr. Sydnor, we have a vote on now, but I think we'll have time to get your statement in, and then we'll go vote and promptly return, but you're recognized.

**TESTIMONY OF THOMAS D. SYDNOR II, VISITING SCHOLAR,  
CENTER FOR INTERNET, COMMUNICATIONS AND TECH-  
NOLOGY POLICY, AMERICAN ENTERPRISE INSTITUTE**

Mr. SYDNOR. Thank you, Mr. Chairman and Members of the Committee.

My name's Tom Sydnor. I am a Visiting Scholar at the Center for Internet, Communications and Technology Policy at the American Enterprise Institute. I'm testifying here today in my personal capacity, and I'd like to thank you for the opportunity to appear during the Subcommittee's review of copyright law.

And I am here today in part because AEI recently—the center asked me to look at a fairly simple question. The issue of copyright term has long been very controversial. I hope those controversies do not necessarily distract the Committee's review from what I consider to be a more critical problem, and that is that right now today on the internet, with mass piracy being what it is, too many creators find that the practical term of their copyright protection is better measured in days or hours than decades. That enforcement problem is fundamental to the operation of the copyright system, and I hope the Subcommittee's review will continue to focus on it.

As far as the issue of term goes, many of the controversies surrounding it have really centered around the fact that it has changed over time, and there are competing explanations for that. We start out, for example, in 1790 with a 28-year maximum term of copyright protection; today under our current laws, the average term would be 95 years. It's a significant change, and the question is why did it occur. Some say it's all just special interest lobbying, others say that the changes have been principled.

So what I have been doing with AEI is looking into those and trying to figure out, why did copyright term change over time, to what principles did those changes respond. The answer is fairly straightforward. If you look at the Copyright Act of 1790, the one that signed into law by President Washington and also James Madison, the others members, the other framers in the first Congress, if you look at its term-related provisions, you'll see two principles revealed there.

One, they wanted copyright term to last through the lifetime of an author plus a potentially short postmortem author period of protection.

Second, the framers looked into international norms. The term-related provisions of the 1790 Act are closely modeled on the best international model available to them, Britain's 1710 Statute of Anne. Those principles for calculating term have not changed over time. They're the same ones we use today.

What has changed over time is the consequences of applying them to the situations that have changed over time. So for example, the framers' first principle, copyright protection needs to extend through the lifetime of the author, dictated change in copy-



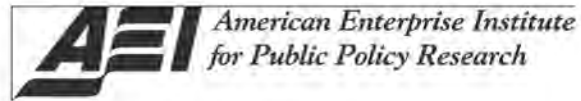
right term over time. People began living longer. Today the average human life expectancy has increased about over 100 percent since 1790. Those changes necessitated increases in copyright term. That is what happened in the Copyright Act of 1831, that also appears to be the principal driver for the extension of copyright term in the Copyright Act of 1909.

The other factor that explains why copyright term has changed is the second principle that the framers looked to, and that's looking to international norms. In the Copyright Act of 1976, we joined the Berne Convention—we moved towards—I'm sorry. We adapted our term provisions toward those in the Berne Convention. And a principle underlies the Berne Convention's approach to calculating the postmortem author period for copyright protection. Basically you could call it three generation copyright protection: copyrights should last through the lifetime of the author, the author's children, the author's grandchildren, those likely to have known the author and heard their expressive intentions personally.

This is a sensible approach to copyright term and those two factors; increasing life span of authors and the change in the principles we use to calculate the postmortem author period, can account for the changes in copyright term that we have seen since the first copyright that came along in 1790. Those changes have been principled. The decision in the Copyright Term Extension Act to go to a system of life plus 70 was in part a response to the Berne Convention's 1948, established in 1948, rule of the shorter term. We have again looked to international norms as we have evolved our copyright laws.

So I do believe the evolution of copyright term has been principled and the laws we have today make sense and that will certainly not end all controversies, but I do hope it helps inform the Committee's review. Thank you.

[The testimony of Mr. Sydnor follows:]



Statement before the House Committee on the Judiciary,  
Subcommittee on Courts, Intellectual Property, and the Internet  
On Hearing Title

## Copyright Term and Moral Rights: Forging the Future by Understanding the Present

Thomas D. Sydnor II

Visiting Scholar, Center for Internet, Communications and Technology Policy,  
American Enterprise Institute

July 15, 2014

*The views expressed in this testimony are those of the author alone and do not necessarily represent those of the American Enterprise Institute.*

Chairman Coble, Ranking Member, and Members of the Subcommittee, my name is Tom Sydnor, and I thank you for asking me to testify during your historic efforts to lead what future scholars should call the Fifth General Revision of U.S. copyright law. I serve as a Visiting Scholar at the Center for Internet, Communications, and Technology Policy at the American Enterprise Institute. But I testify today in my personal capacity; my views thus reflect only my own opinions, not those of any present or past employer.

I am also honored and humbled by your invitation to testify at this hearing. During my career, I have spent thousands of hours studying the testimony, bills, reports and studies that record the Fourth General Revision that produced the basis for our current copyright laws, the Copyright Act of 1976. I thus appreciate the significance of this opportunity to contribute to your efforts to lead a Fifth General Revision that produces what the Register of Copyrights has called "Our Next Great Copyright Act."

My written testimony will focus on what has long been a persistently controversial issue in copyright law—the issue of copyright term—the question of how long copyright protection should last.

#### ***The Issue of Copyright Term***

In copyright law, the issue of copyright term has long been controversial, and for many reasons. One, in particular, best explains why I can hope that my testimony may help the Subcommittee and Congress to resolve some important and bitterly contested claims about copyright term, but I cannot expect it to resolve all disputes about copyright term by revealing the one, right answer to the question of how long the economic rights of copyright owners should last. There seems to be no one, "right" answer to the question of copyright term, and that seems to ensure that copyright term will always be a contentious issue.

Simply put, the question of copyright term interacts with all of the other important – and more important – questions at issue during a General Revision of US copyright law. Consequently, the question of term cannot be isolated and resolved definitively. For example, our current patent act grants extremely broad and nearly exception-free exclusive rights to qualifying inventors that last for only 20 years. That can suggest that much broader copyrights lasting for only a few decades could adequately encourage private investment in, and production of, expressive works – but I am unaware of any broad support for making copyrights more like patents.

Therefore, my testimony takes a pragmatic approach to questions relating to copyright term. It is based upon on three principles.

*First*, during a General Revision, we should not let eternal debates about copyright term distract us from first confronting and resolving more fundamental questions. Today, those truly fundamental questions seem to relate to copyright enforcement: how, and against whom, do we want copyright owners to enforce their rights, *as a practical matter*, against the torrent of Internet piracy that has arisen during the past sixteen years? The potential range of answers to that question are finite, but choosing among them means deciding whether and to what extent it is desirable or practical to continue to enforce copyrights against intermediaries, (as we did in the past), or to shift its focus by requiring copyright owners to enforce their federal civil rights by suing, or threatening to sue, individual Internet users. These fundamental questions are also implicated by this hearing. Today, too many creators and investors find that the practical term of their US copyright protection is best measured in hours or days, not years or decades. Consequently, even the most principled analysis of how long copyrights should last, (*if* they could actually be enforced, in practice, and even by individual creators and small-and-

medium sized creative companies), can become depressingly academic and even misleading, if enforcing copyrights becomes prohibitively expensive, time-consuming, and disfavored. To be sure, we never wholly eliminated infringement and counterfeiting in the brick-and-mortar world, and we cannot expect to do so on the Internet. But as in the brick-and-mortar world, we do need Internet-enforcement systems that can, in practice, reduce infringement and counterfeiting to a dull roar. Unless we develop such systems, most existing analyses of copyright term may be unhelpful. For example, economic analyses of property-right-related questions like copyright term often presume that the rights in question can be perfectly enforced. That presumption is never entirely accurate, but if reality differs too radically from it, then analyses based on it become unhelpful or even misleading. A Fifth General Revision should thus debate copyright term, but it should not let that debate become the proverbial cart that drives the horse.

Second, in the late 20<sup>th</sup> century, over a century of multinational efforts finally generated almost universally accepted *de jure* international norms for copyright protection. Many of those substantive norms for copyright protection are prescribed by the 1979 version of the *Berne Convention for the Protection of Literary and Artistic Works* and can now be enforced by trade sanctions levied through World-Trade-Organization dispute settlement proceedings as a result of the 1994 *Agreement on Trade-Related Aspects of Intellectual Property Rights*, (“TRIPS” or the “TRIPS Agreement”). These Berne/TRIPS norms arose from international negotiations and agreements – and they can still be changed, if needed, through such processes. Consequently, the US should not unilaterally change its laws on copyright term, (or term-related formalities, like renewal), in ways likely to violate our WTO obligations, or let other countries deny our authors benefits they grant to their own authors. The US is now a very successful net exporter of many copyrighted works, including books, music, movies, TV shows and other audiovisual works, application software, entertainment software, and mobile “apps.” We should thus refrain from unilaterally altering our copyright laws in ways likely to violate our WTO obligations. This may seem like common sense, but too many recent “copyright-reform” proposals have ignored it.

Third, before deciding whether or how copyright term should change in the future, we should first understand why federal copyright term has evolved from the 28-year maximum prescribed by the Copyright Act of 1790 into the life-of-the-author-plus-70-year term underlying our current copyright laws. Unfortunately, questions about why copyright term has changed over time have remained bitterly disputed.

I hope that the first two of these principles will be relatively uncontroversial, so I want to focus on the disputed question raised by the third principle. Last month, the Center for Internet, Communication, and Technology Policy at the American Enterprise Institute, (“CICTP”) asked me to prepare a paper that investigates the question of why the term of US copyright protection has changed from 1790 to today. The preliminary results of my ongoing research follow.

#### *Understanding the Evolution of Copyright Term from 1790 to Today.*

US Copyright term has changed during the 224 years since the Framers of our Constitution enacted the Copyright Act of 1790. For example, assume that state common-law protection and the federal 1790 Act produced U.S. copyright protection that lasted for an average of 20 years. Today, purely federal copyright protection lasts for a term of the-life-of-the-author-plus-70 years—on average, for about 95 years. The resulting rough comparison does suggest that the average term of U.S. copyright protection has increased by 375% during the last 224 years.

That is a significant increase, and we do need to understand why it occurred. But the reasons for it remain bitterly contested even after the Supreme Court's *Eldred v. Ashcroft* decision upheld the constitutionality of our current laws on copyright term. Nevertheless, some scholars, analysts and lobbyists still argue that copyright term has evolved, and will keep evolving, along a "Mickey Mouse curve" that will eventually lead to copyright terms that last as long as the potentially indefinite life span of a particularly valuable animated character. Predictably, other scholars and analysts, as well as creators and creative industries, vigorously deny such claims.

The Subcommittee's ongoing General-Revision efforts would benefit from an effort to assess these clashing explanations for the evolution of US copyright term. In past General Revisions, Congress has increased copyright term, decreased it, and left it unchanged. Congress increased the term of U.S. copyright protection during the First General Revision that produced the Copyright Act of 1831. It left term unchanged during the Second General Revision that produced the Copyright Act of 1870. It increased copyright term during the Third General Revision that produced the Copyright Act of 1909. During the Fourth General Revision that produced the Copyright Act of 1976, Congress increased the term of protection as to some works, and decreased it as to others.

To understand why US copyright term has changed since 1790 – and whether those changes have been principled or unprincipled – one must begin with the Copyright Act of 1790, the law that first granted *federal* exclusive rights to authors. It is important to begin with the Copyright Act of 1790 because it remains one of the most under-appreciated documents in the history of copyright law for two reasons.

First, the 1790 Act was remarkable because it was enacted in May of 1790. In 1789, the Constitution had been ratified, George Washington had been elected as the first President, and James Madison and other Framers had been elected as Members of the First Congress. The bitterly contested Ratification process thus made them the leaders of a historically untested federation of independent States that had been united by war, divided by Ratification debates and many other issues, and were, in effect, collectively bankrupt. No one could have faulted the first President and Congress had they not enacted a federal copyright law, but President Washington saw copyright protection a basic duty of any civilized nation. Consequently, in his 1790 State of the Union address to Congress, Washington urged Madison and the other Members of Congress. Six weeks later, a bill proposing copyright protection was introduced, and about three months after that, the First Congress and President enacted the Copyright Act of 1790 into law. To the Framers, protecting the copyrights of authors was a critical duty.

Second, too many have wrongly dismissed the 1790 Act as just a near-clone of the first modern copyright law, Britain's 1710 Statute of Anne. The 1790 Act did closely follow the Statute-of-Anne model in many respects – including those relating to copyright term – but it also rejected that model in a critical respect. The Statute of Anne also contained what copyright lawyers might now call a general-compulsory-licensing provision: anyone who thought that copies of a protected work were overpriced could complain to listed governmental, ecclesiastical or university officials who could then force the copyright owner to sell copies of the work at whatever price the official set. The Framers rejected this provision of the Statute of Anne, and thus created a truly market-based copyright law.

Consequently, the term-related provisions of the 1790 Act deserve study. They reveal two critical principles that the Framers used to set copyright term.

- The Framers concluded that copyright term should last during the lifetime of a work's author, and for a (potentially short) post-mortem-author period in which an author's copyrights could support his or her spouse and children.
- The Framers also examined and adopted international norms relating to copyright term. The term-related provisions of the 1790 Act thus closely track the term-related provisions of what was then the best international model for federal copyright protection – Britain's 1790 Statute of Anne.

During the next 224 years of federal copyright law, copyright term did change significantly – but not because subsequent Congresses later abandoned the principles that the Framers had used to calculate copyright term. To the contrary, term-calculation principles have not changed materially since 1790. Nevertheless, over time, efforts to re-apply the Framers' principles did require copyright term to increase significantly, at least in the case of the term of *federal* copyright protection. Two factors drove post-1790 increases in federal copyright term.

*First*, the Framers' principle of providing at least life-of-the-author copyright protection repeatedly required term to increase. Over time, authors and others simply began living longer than they tended to in 1790. For example, since 1790, the average human lifespan has increased by about 100% – from about 40 years to about 80 years. The Framers' premise of life-of-the-author copyright term then required increases in copyright term.

*Second*, the Framers' principle of following international norms for copyright term eventually generated a new, principled basis for calculating the term of post-mortem-author copyright protection. The term provisions of the Copyright Act of 1790 permitted copyright protection to extend beyond the death of a work's author. In the Copyright Act of 1831, Congress provided that a renewed term of copyright protection could be claimed by an author's descendants. The US has thus long recognized that copyright term should protect not only a work's author during his or her lifetime, but also his or her family after the author's death. Nevertheless, pre-1976 US copyright acts do not seem to clearly prescribe any principle for calculating the term of post-mortem-author protection.

But during the 20<sup>th</sup> century, the international, *Berne Convention* norms did prescribe such a principle: the *Berne Convention* prescribes at least a life-of-the-author-plus-50-year term of protection that implements a principle of three-generation copyright protection. Under *Berne*, copyrights are supposed to last during the lifetimes of a work's author and his or her children and grandchildren.

This *Berne-Convention* principle for calculating the term of post-mortem-author copyright protection has both humanistic and economic components. Copyrights do not protect works, they protect only their expressive components. Consequently, the author of a work and descendants who knew him or her personally would tend to be uniquely well-situated to understand what a work's author intended to express and which future uses of the work would maximize the value of the expressive components of the work that copyrights protect. The *Berne Convention* thus presumes that copyright protection should persist during their lifetimes.

In the Copyright Act of 1976, Congress first adopted a *Berne-Convention*-compliant term of life-of-the-author-plus-50 years. The US then formally joined the Berne Union in 1988, and later responded to the so-called "Rule of the Shorter Term" that had been incorporated into the *Berne Convention* in 1948 by enacting the Copyright Term Extension Act of 1998.

Collectively, these two factors thus explain why federal copyright term has increased from 1790 to 2014. They also explain why US copyright laws have consistently followed the Framers' principle of applying changes in copyright term *retroactively* to both existing and newly created works. In *Eldred v. Ashcroft*, the Supreme Court held that why changes in copyright term have always been applied. But another factor has also been at work. In the US, legislative calculations of copyright term have always been driven by estimates of how long human authors are likely to live. Human life spans change gradually, but laws that calculate copyright terms by estimating human life spans do not – and that is another reason why changes in copyright term have been applied retroactively, to then-existing works.

For example, perhaps the most significant US expansion of copyright term for published works occurred on January 1, 1978, when the Copyright Act of 1976 became effective. But that Act was intended to provide authors with three-generation, *Berne-Convention* compliant copyright protection – and there was no reason to conclude that authors who chose to publish their works on December 31, 1977 would likely die long before authors who published their works a day later. Consequently, the 1976 Act's changes to copyright term applied retroactively to existing works – just as like the preceding changes in term resulting from the Copyright Act of 1790, the Copyright Act of 1831, and the Copyright Act of 1909. Predictably, Congress also later retroactively applied the extension of term effected by the Copyright Term Extension Act of 1998.

#### *Recommendations Relating to Copyright Term*

I hope my testimony, ongoing research, and forthcoming paper will help the Subcommittee decide when and how to prioritize questions about copyright term during a Fifth General Revision. While I do not believe that my research necessarily tells the Subcommittee exactly whether or how existing copyright laws related to term should change, I do want to conclude with some thoughts on questions about copyright term that the Subcommittee's General Revision efforts must eventually confront.

*First*, while three past General Revisions of US copyright laws have expanded the term of federal copyright protection, I am unaware of any present interest – by creators and creative industries, or by the public generally – in further expansion or extension of US copyright term. As a practical matter, it thus seems like a Fifth General Revision of US copyright law may focus on whether copyright term should be left unchanged. If copyright term is changed, I think that history strongly suggests that any such change should be principled, and it should not violate any *Berne-Convention/TRIPS-Agreement* norms.

*Second*, the current Register of Copyrights, Ms. Maria Pallante, has proposed a change in existing laws regarding term: the Register has proposed to retain our existing term of life-of-the-author-plus-70 year copyright protection, but to condition the last twenty years of protection on the fulfillment of a formality – a renewal obligation. The Register's proposal deserves careful consideration, and further study, by the Subcommittee, Congress and the Executive Branch. I do not think that it would violate our *Berne-Convention/TRIPS-Agreement* obligations. Nevertheless, I think we should further study at least three *potential* issues:

- Will other nations, like the EU Member States, be likely to conclude that they can and should invoke the *Berne Convention's* Rule of the Shorter Term against the authors of a country that conditions the last 20 years of a life-of-the-author-plus-70-year copyright term upon the fulfillment of a formality? We must further study this question in order to assess all potential costs and benefits of this proposed change.

- Would conditioning the last 20 years of a life-of-the-author-plus-70-year copyright term upon the fulfillment of a renewal formality cause other nations to impose similar national renewal obligations? One US renewal requirement might not impose an excessive burden upon copyright owners, but many, differently configured, national renewal requirements could easily become prohibitively burdensome.
- Can we articulate a principled basis for reducing the base term of formality-free copyright protection to life-of-the-author-plus-50 years? My research could suggest one. Given current, developed-world life expectancies, such a term could arguably implement two-generation copyright protection – a term of protection that would last through the lifetimes of an author and her or his children. Indeed, even were our current life-of-the-author-plus-70-year copyright term left unchanged during a Fifth General Revision, relatively small, foreseeable increases in human life expectancy might soon require us to characterize even our current approach to copyright term as providing two-generation copyright protection.

In short, our approach to the issue of copyright term should continue to be principled. I hope that this testimony assists the Subcommittee's efforts to lead a Fifth General Revision of US copyright law, and I am honored by the opportunity to participate in that historic process.



Mr. COBLE. Thank you, Mr. Sydnor.

We have a vote on the floor, folks, so we will be back on or about 20 minutes. So you all rest easy in the interim, and we'll see you shortly.

[Recess.]

[3:21 p.m.]

Mr. MARINO [presiding]. This hearing will now come to order. I believe that everyone has made their opening statement. Is that correct, Mr. Sydnor? You made your opening statement? I had to step out for a moment. I had someone in the hall.

Mr. SYDNOR. Yes, I did.

Mr. MARINO. Okay. So now comes the time for our questioning, and I am going to as I traditionally do, I will go last regardless of who shows up and ask if my colleague, the Ranking Member, Mr. Nadler, would begin by asking you questions.

Mr. NADLER. Well thank you, Mr. Chairman.

Let me begin by asking a few questions of Ms. Claggett. How many other countries have a resale royalty for artists?

Ms. CLAGGETT. We surveyed the international world to see how many resale royalties have been adopted, and we counted more than 70 countries with resale royalty rights.

Mr. NADLER. And France first created this in 1920?

Ms. CLAGGETT. Yes. They were the first country.

Mr. NADLER. This is not a new concept?

Ms. CLAGGETT. Not at all.

Mr. NADLER. We have got plenty experience with it?

Ms. CLAGGETT. Yes.

Mr. NADLER. You mentioned in your testimony that the EU, the European Union, extended royalties to all EU member states. Do you agree that this constitutes a growing international consensus that artists deserve to benefit when their works of visual art are resold?

Ms. CLAGGETT. Yes. As you mentioned this is an issue that has been debated and looked at since 1920, and it is something that more recently a number of countries have adopted. We counted just in the time between our 1992 report and our 2013 report, more than 30 countries adopting a resale royalty right.

Mr. NADLER. More than 30 countries in the last dozen years, or 20 years?

Ms. CLAGGETT. Right.

Mr. NADLER. Now, why do you believe there is a compelling international trend that makes U.S. review of the resale royalty timely an important?

Ms. CLAGGETT. Because of the number of countries that are actually adopting a right. As I mentioned in my testimony, since the resale royalty right under the Berne Convention is reciprocal, that does in some sense work to disadvantage of American artists twice that is where they can be at a disadvantage because they don't actually have resale royalties in the United States, but they are also disadvantaged because they don't have the ability to actually take royalties in countries that do have the right and since more and more countries are adopting a right, that serves to put them at a disadvantage.

Mr. NADLER. At a greater and greater disadvantage?

Ms. CLAGGETT. Yes.

Mr. NADLER. Have you reviewed the American Royalties Too Act?

Ms. CLAGGETT. Yes.

Mr. NADLER. Does the legislation incorporate many of the recommendations of the Copyright Office, and do you believe it would benefit artists without harming the art market or unduly burdening auction houses that already administer resale royalties in other countries?

Ms. CLAGGETT. We were certainly very pleased that the American Royalties Too Act adopted a number of our recommendations. As we had said in our report, we wanted to make sure that a royalties bill would be able to address the most number of artists with the least amount of harm to the art market, so some of the recommendations that were taken in the American Royalties Too Act, including the low eligibility threshold, the cap on a royalty rate, further study to see how things would operate in the market, were really key recommendations that we were very pleased that the bill adopted.

Mr. NADLER. So from the experience in other countries and from your examination of the bill, do you believe that it would harm the art market?

Ms. CLAGGETT. We were not able to find any direct studies or empirical evidence that a resale royalty bill would, in fact, harm the art market. That was one of the things we raised in our report.

Mr. NADLER. When you say you haven't found any empirical evidence—

Ms. CLAGGETT. No.

Mr. NADLER [continuing]. In countries that have adopted it?

Ms. CLAGGETT. Right. For example, the European Union did a study in 2011, I believe. The UK did a study in 2008. The UK, which is one of the largest art markets in the world, their study concluded they couldn't find any harm or diversion in the art market from the UK after the adoption of a resale royalties right.

Mr. NADLER. Now, you say that at its core the issue of resale royalties is an issue of fundamental fairness. Why do you believe it is critical for visual artists to be able to receive some compensation from the substantial increases in the value of their works over time?

Ms. CLAGGETT. Well, it just goes back to the underlying premises of our copyright system, that by receiving economic compensation for the fruits of their labor, for their work, they will be incentivized to create more works and resale royalties helps to provide additional benefits for artists. They can use the payments that they receive from royalties to reinvest in their art and to be able to conduct their work full-time as an artist.

Mr. NADLER. Now, in your testimony, you say, and I quote, "the office also cited studies indicating that the adverse market harms that have been predicted to result from such laws, had not materialized in countries that had enacted resale royalty legislation." Why do you think that these adverse market harms that had been predicted to result from resale royalty works did not occur in the countries that enacted this kind of legislation?

Ms. CLAGGETT. I think that one of the reasons is just the fact that a resale royalty is actually only going to be one small factor

that will affect the art market. These studies highlighted the fact that there are a number of factors that will affect, you know, where the market will be.

For example, there are other fees and commissions that are often imposed on art transactions that also affect the art market. You can't focus just on a resale royalty. Buyers commissions, for example, in auction houses are much higher than a resale royalty. I think the UK report noted that the cost of shipping art overseas actually might in some sense be more than a resale royalty. So, there are a lot of factors in how the art market operates, and trying to pin it on a resale royalty is something that, at least the studies we reviewed, weren't able to do.

Mr. NADLER. So the harms that were predicted did not occur?

Ms. CLAGGETT. Yes.

Mr. NADLER. And my last question really is, the large auction houses, specifically Sotheby's and Christie's, are lobbying against this bill very hard. They are saying it will harm the art market as it hasn't done abroad. Are the big auction houses doing okay in the art market and sales abroad where they have the resale rights?

Ms. CLAGGETT. I wouldn't want to speak on the auction houses, I will say that we did note in our report that the auction houses had, for example, recently increased their buyer's commission, which is another fee that is imposed on art transactions, and the art market was able to accommodate that fee without being harmed in any specific way.

Mr. NADLER. So we have a robust market and an unfairness, and fixing the unfairness by passing this bill would not appear either theoretically or from experience over the last 20, 30 years to harm that market in any way?

Ms. CLAGGETT. No. I mean, we did note that there are some continuing studies going on. For example, the UK is in the process of doing another study that we would obviously want to be able to consider as we review this issue, but for the work that we have done so far, we haven't been able to find any evidence that there would be a significant harm in the market.

Mr. NADLER. So we should join the rest of humanity in this respect. Thank you very much.

I yield back.

Ms. CLAGGETT. Thank you.

Mr. MARINO. Chair recognizes Mr. Conyers.

Mr. CONYERS. Thank you, Chairman.

I would like to begin with the Songwriters Guild president, and could you explain from your perspective how moral rights, specifically the rights of attribution and integrity are important to the song writing community.

Mr. CARNES. Yes. Certainly attribution is incredibly important if you are going to establish some sort of credibility as a songwriter. You know, songwriters sort of labor in the back stage part of the music business to begin with. So what we really need is for somebody somewhere to know that we wrote those songs and if we don't have for instance, our names on the title and then our names underneath the title on some sort of album cover, or nowadays it is videos. They'll show the video and if they don't attribute the work to us, then we lose the you know, the credibility of being the writer

that wrote that song and unfortunately, most of the public thinks that the artists write all of their songs by themselves, and because of that it makes it harder for us to establish our careers.

In terms of right of integrity, certainly when you have a song that is about something that you feel is significant and it is you know, like I had a song it was about my mother and the death of my mother. It was very important to me. I wouldn't want to see that song played on you know, YouTube with somebody getting hit in the crotch with a baseball bat, for instance. I think that there are uses of songs that do actually hurt the integrity of the song, and that actually affects not just the moral rights but the economic value of the song.

Mr. CONYERS. Well, thank you so much.

Let me ask Mr. Rae of any recommended steps that we and the Congress may take to help with the attribution for moral rights?

Mr. RAE. One of the issues that has bedeviled the music industry for a long time is the fact that we don't have a lot of good information about who owns what, which is a fundamental first stage problem.

And the second stage is also, yes, absolutely for the purposes of compensation, for the purposes of just being recognized for your work and having opportunities to get new work from that recognition, attribution is an important component. I think that within the area of attribution, also extending to termination rights and even copyright terms, all of our current tensions in the music industries at least, could be somewhat relieved by having better informational management systems.

In a previous hearing on music licensing, a colleague Jim Griffin, spoke about ways forward to get those information systems in place, and I think that there could be a requirement for attribution in certain use environments that would be very, very helpful to musicians and songwriters.

One of the issues from our research into sampling and remix culture, for example, has demonstrated very clearly that in many instances, even if it is not remuneration, that a recording artist seeks, it is certainly attribution. So I think attribution is a very important area that Congress could work to clarify. Any efforts in that direction would be greatly enhanced by having better informational systems about who owns what music, who performed on what songs and who wrote those songs.

Mr. CONYERS. Mr. President of the Songwriters, do you think there needs to be more clarification on who owns what?

Mr. CARNES. Well, yes, there does need to be, but it is very difficult to determine who is going to control that information, how difficult and costly it is to actually gather that information, how to get the societies that might have that information to cooperate with each other, what the data format might be for all that information to be shared and what systems will control it. It is a great concept. It is hard to actually effectively get that concept to work in the real world. I approve of the idea, certainly.

Mr. CONYERS. So there is work going on to make sure that it improves?

Mr. CARNES. Yes. We have been seeing that unfortunately go on for years and years and years.

Mr. CONYERS. Been going on for a while?

Mr. CARNES. Uh-huh.

Mr. CONYERS. Thank you, Mr. Chairman.

I will turn back any time that remains.

Mr. MARINO. The Chair recognizes Mr. Smith.

Mr. SMITH OF MISSOURI. Thank you Mr. Chairman.

Mr. Carnes, it is a pleasure for you to be before our Committee as a songwriter who has wrote some songs for my favorite musical artist. I am not going to say her name, but she is clearly the queen of country music and let's just say I can't even get the blues no more.

Mr. CARNES. There you go.

Mr. SMITH OF MISSOURI. But my question would be, how does one balance the free speech principles with an artist's desire to control downstream uses of his work?

Mr. CARNES. Well, copyright itself has all kinds of protections for free you know, for free speech and First Amendment rights. As a matter of fact, copyright is the driver of free speech I think, and then you know, the Supreme Court has agreed with that.

In terms of copyright limiting free speech, it is not free speech we are limiting. It's, we have a unique expression. Like if I write a song about love, it is my unique expression of love. I am not keeping anybody else from writing a song about love. Right? So I think that all the protections for First Amendment free speech are in the copyright law because it is about my unique expression. I am not limiting anyone else's expression.

Mr. SMITH OF MISSOURI. Perfect. Thank you.

Mr. Rae, in your testimony you talked about the term of copyright. In your opinion, what effects would extending the term of copyright do for independent artists and creators?

Mr. RAE. I think one of the things that really needs to be addressed here is how do we advance fundamental respect for copyright, because at the end of the day, even for a small creator, especially for a small creator, copyright is one of the tools, perhaps one of the more important tools that you have at your disposal, to get paid and to protect your rights.

The issue here is that in the public mind, perhaps wrongly, many people believe that copyright has been extended only for the benefit of corporations. So I think perpetuating that idea is very, very difficult, and I think further term extensions might actually exacerbate that fundamental disconnect from the value of a creative work and who benefits from its exploitation.

I would like to see balance restored to copyright so we could feel confident that artists have an ability to be cut into the value generated from their works under whatever term Congress or you know, the Supreme Court previously decided, but certainly not at a point where it starts to cheapen the value of copyright in the eyes of the public that also benefits from its availability.

Mr. CARNES. If I may interject real quickly because this is very near and dear to my heart, the copyright term.

I would like to point out that when we talk about perhaps reducing the copyright term or making some sort of formalities happen at 50 years, it is time to stop and remember that the actual effective term of copyright right now with the piracy that is going on,

is from the time I write the song and the first recorded version of it gets uploaded to the internet, because the second it goes up there, I lose control of the copyright.

Copyright becomes a voluntary opt-in system now because I have no effective way to enforce my copyright because I have to make a Federal case out of actually suing someone for infringement, and I don't have a quarter of a million dollars to sue. Okay, so it becomes prohibitively expensive. If we had some sort of small claims venue perhaps, you know, like the Copyright Office is doing a study about that now, that might be a way in which we could actually enforce our rights. So that's all I'm saying.

The term of copyright we should just leave where it is right now because, like I say, it has been shortened drastically by piracy.

Mr. SMITH OF MISSOURI. Thank you.

Mr. Sydnor, would you like to respond to that question?

Mr. SYDNOR. Certainly. Thank you.

I think Mr. Rae made an important point when he said that public perceptions of copyright term may perhaps, wrongly, I think that the last two laws is the product of special interest lobbying. The simple truth of the matter is the term we have right now is there for reasons. We evolved to it for reasons that have never changed during the history of the republic.

It is a sensible way of limiting copyright, basically cutting off copyright term during a period defined by the lives of the people who knew the author and his or her work personally, and are likely as an economic matter to be best situated to be able to decide how to exploit the expressive value of the work, which is what copyright protects.

So what I hope my research helps clarify is that, in fact, what we have seen a principled evolution of copyright term where the principles haven't changed. The consequences of applying them have, and I think that has given us the copyright term that we set out to create.

Mr. SMITH OF MISSOURI. Thank you, Mr. Chairman.

Mr. MARINO. Ms. Clagett, I am going to ask you a question, and if anyone else would like to respond to it down the line, please do so.

There is a legal term, and I am sure you are aware of it of rule of perpetuity. Some countries allow, it is the law that family members will continue to inherit from a piece of work if there is something to inherit, meaning that the owner or the owner's family will keep that in their possession forever. Would you please give me your insight on the up side or the down side to that concept?

Ms. CLAGETT. Well, with respect to copyright law, there certainly would be a down side if you were able to keep control forever. That would be against our Constitution which provides for a limited term of copyright and would upset the balance that our founding fathers had in terms of providing for economic rights for authors but also ensuring that public works or creative works would be disseminated to the public.

Mr. MARINO. Anyone else?

Mr. SYDNOR. One comment, I guess. I think Ms. Clagett is right. Obviously our copyright term has a limit, it can be and copyrights

are descendable. They can transfer down to descendants and survivors of descendants. It has been that way clearly since 1831.

And the other point that might be worth mentioning on this, that it ties in with, we have been discussing termination of transfers in this hearing. It is also important to realize that in evaluating some of the controversies about termination of transfers, I do think it is important to recognize what it replaced. What it replaced was the two-part system of an initial and a renewal term of copyright protection that we relied on from 1790 until 1978.

We replaced that system because it was intended to do what termination of transfers were intended to do. It was intended to provide a benefit for the artist, but people turned out to be not very good at marking their calendars 28 years in advance, and as a result, it simply ended up with a lot of copyrights, artists not having their copyrights at all.

So termination of transfers is certainly a better way to pursue a goal that we have consistently, that has been part of our copyright law since 1790.

Mr. CARROLL. I would just like to add I think that in the question it is implied that this idea of property is the same when we talk about land and when we talk about copyrights, and they are really quite different because scarce resources and ownership over scarce resources is different than ownership over information rights and that the founders recognized that difference when they put the limited times in the Constitution.

And I read the history different than Mr. Sydnor about the two terms. I think most copyright owners didn't have any economic use for their copyrights after the first term and didn't bother to re-register, and so I think there is a lot of public benefit from a limited time, and any extension, any incursion into the public domain would actually harm the public.

Mr. RAE. I would add that explicit in the compact outlined in the Constitution is the incentive to author benefit, but also it is to bring new creative works forward.

But the issue sometimes that we bump up into in the music industry, is the Constitution is silent on intermediaries. It doesn't mention anybody to whom those works are transferred. So somewhere before that work reaches the public domain in its natural life, whether that is life plus 70 or whatever the term is, artists still need to be able to tap into that value at the end of that life span and I think that that is definitely in favor of preserving, maintaining, and potentially clarifying termination.

One other point that I would like to make is our music industries have also, artists within them have struggled because oftentimes a rights holder to whom a copyright is transferred, doesn't publish the work, doesn't bring that record album forward, doesn't release the LP.

And I think that another way Congress might be helpful is establishing a point by which an artist can recapture that right if the transferee, the label or the publisher does not exploit it.

Mr. MARINO. Thank you. My time has just about expired.

I see no other Congressmen or Congresswomen here to ask questions.

So as a result I want to thank the Committee for being here. I apologize again for interrupting, but you know how the votes go.

This concludes today's hearing. Thanks to all of our witnesses attending. Thanks to the people in the gallery for being here.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record. This hearing is adjourned.

[Whereupon, at 3:44 p.m., the Subcommittee was adjourned.]



## A P P E N D I X

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MATERIAL SUBMITTED FOR THE HEARING RECORD



July 14, 2014

Rep. Howard Coble, Chairman  
Rep. Jerry Nadler, Ranking Member  
United States House of Representatives  
Judiciary Subcommittee on Courts, Intellectual Property, and the Internet  
2138 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Coble and Ranking Member Nadler:

The Directors Guild of America (DGA) and the Writers Guild of America, West (WGAW) respectfully submit this statement in connection with the July 15<sup>th</sup> Subcommittee hearing on moral rights and a number of other copyright related rights and issues. The focus of our submission is moral rights and not the other issues addressed at today's hearing. DGA represents over 15,000 directors and members of the directing team who create the feature films, television programs, commercials, documentaries, news and other motion pictures that are this country's greatest cultural export. WGAW represents more than 8,000 professional writers of motion pictures, television, radio, and Internet programming, including news and documentaries. Both DGA's and WGAW's mission is to protect the creative and economic rights of their members.

The debate over moral rights in the United States is not a new one to us. The DGA and WGAW have been making clear our position on moral rights, and its absence in the United States, for well over thirty years. In fact, a prominent delegation of Guild members testified before the Senate Judiciary Committee on the Berne Treaty and moral rights in both 1987 and 1988, so we welcome the opportunity to reiterate the fundamental importance of this issue to us and our members. We think an examination of moral rights is particularly relevant in today's world; when filmmaking is global, there is an ever growing myriad of distribution sources, and authorship and its creations know no geographic boundary. The digital age has made it all the more important that there exist moral rights for writers and directors.

In the United States, writers and directors are typically employed by film and television studios on a "work for hire" basis and accordingly, under U.S. law do not enjoy authorship rights nor, in most instances, do they hold the copyright to the motion pictures that they write or direct. However, Congress should be aware that our members do hold very specific and longstanding economic and creative rights established by collective bargaining agreements and specific

*DGA & WGAW: Letter to Chairman Coble & Ranking Member Nadler re: Moral Rights  
July 15, 2014 Hearing in the Judiciary Subcommittee on Courts, Intellectual Property, & the Internet*

contractual arrangements entered into with the copyright holder. In addition, there are numerous international treaties that acknowledge and enshrine writers' and directors' human rights with respect to the exploitation of their work. It is our contention that the existence of these economic, creative, and human rights demonstrate that writers and directors are in fact rightsholders precisely in the sense implied under a moral rights regime. Moreover, we assert that claim for writers and directors who do not enjoy the benefits of our collective bargaining agreements.

Furthermore, while under U.S. law the financiers of motion pictures are deemed their "authors," funding a motion picture is the same as actually creating it. Holding a copyright does not confer artistic talent on a corporate entity. Rather, it is the writer's and director's creativity and vision that is decisive in telling a story. A myriad of intensely personal and visionary creative decisions give life to a motion picture. Creating a motion picture first and foremost comes down to a very personal, ephemeral process that draws deep on the imagination. No two films are the same and there is never any guarantee, despite all the talent and hard work involved, as to how that film will come out. In other words, creative expression, like authorship, is a human, not a corporate quality. We believe that authorship has to do with creative vision – and that moral rights reside with those who have that vision.

The reality of true authorship is also why, long after the copyright holder determines that a film has no continuing economic value, or insufficient value to justify the expense of protecting the copyright of the motion picture, it still has value to the creators. Ultimately, it is not the corporate copyright holder's highest priority to protect a film, and the writer and the director take on the fight to protect their work from alteration, exploitation, and manipulation. Unfortunately in the United States, where writers and directors work without the protections offered to creators in nations where moral rights are accepted as law, they have very limited ability to actually protect their works for future audiences to enjoy. Again, it is our contention that creators fight to protect their work, and that authorship, and the moral rights that accrue to it, rightfully belong to our members, and our members alone.

Finally, we are well aware the U.S. government has asserted that the Lanham Act is sufficient to ensure that U.S. law meets the minimum standards of moral rights required by the Berne treaty. Simply stated, we do not agree. American writers and directors have none of the moral rights protections guaranteed in Article 6 bis of the Berne Convention.

## **BACKGROUND**

The moral rights of motion picture authors (a term that includes both writers and directors under European law) have long been part of international law. In countries that acknowledge and respect strong moral rights, writers and directors are recognized as having a continuing interest in protecting their motion pictures from distortion or manipulation that undermines their creative reputation. The Berne Convention's provision on moral rights, to which the United States is a signatory, provides specific protections to authors and creators, including the right of attribution (to receive or decline credit for their work) and the right of integrity (to prohibit

*DGA & WGAW: Letter to Chairman Coble & Ranking Member Nadler re: Moral Rights  
July 15, 2014 Hearing in the Judiciary Subcommittee on Courts, Intellectual Property, & the Internet*

distortion or mutilation of the work). As is well known to this Committee, while Congress has enacted limited moral rights protections, such as the *Visual Artists Rights Act of 1990*, it has limited the protections for authors of “works of visual art” and has specifically excluded works for hire. Thus, it has no applicability for audiovisual screenwriters and directors. As a signatory to the Berne convention, the U.S. implications of the limited statutory reach of VARA are not clear. This was stated in a Copyright Office 1996 study assessing the waiver provisions contained in the legislation:

Nations that are members of the Berne Convention for the Protection of Literary and Artistic Works are required to meet a minimum level of protection, as set forth in the Berne Convention’s Article 6bis. The multilateral treaty does not address waiver of moral rights; waiver is neither sanctioned nor prohibited, and individual member nations may implement the Berne Convention in their own ways.

While United States law does not acknowledge the moral rights of writers and directors, the Copyright Office has, in limited ways, acknowledged the role this right plays in copyright law. In 2004 testimony before the House Judiciary Committee on the *Family Movie Act*, the then-Register of Copyrights alluded to “fundamental principles of copyright, which recognize that authors have moral rights”. She commented that:

But beyond our treaty obligations, the principles underlying moral rights are important. The right of integrity – the author’s right to prevent, in the words of Article 6bis of the Berne Convention – the “distortion, mutilation, or any other modification of, or other derogatory action in relation to [his or her] work, which would be prejudicial to his honor or reputation” is a reflection of an important principle...I can well understand how motion picture directors may be offended when a product with which they have no connection and over which they have no control creates an altered presentation of their artistic creations by removing some of the directors’ creative expression. This is more than a matter of personal preference or offense; it finds its roots in the principle underlying moral rights; that a creative work is the offspring of its author, who has every right to object to what he or she perceives as a mutilation of his or her work.

While those views were stated with regard to the ability of companies to market software that edits movies under the *Family Movie Act*, they have not lost their applicability in today’s world. For example, the issue of orphan works which is under consideration by this Committee as part of copyright reform, directly raises the issues of whether the public should have the right to make changes to a motion picture without the ability of the actual authors and creators to prevent such action.

*DGA & WGAW: Letter to Chairman Coble & Ranking Member Nadler re: Moral Rights  
July 15, 2014 Hearing in the Judiciary Subcommittee on Courts, Intellectual Property, & the Internet*

## CONCLUSION

We are at a time when the digital age has advanced so rapidly that this Committee is reviewing and potentially re-thinking our copyright laws. We are all aware that may well be necessary. The advance of technology is embraced by our members who historically have always been at the cutting edge of changing technology, always in search of new ways to tell a story. Our members are also entrepreneurs who envision how new ways of distribution can further their ability to reach the public. Our members are also well aware that with these changes come potential dangers to their works and their livelihoods. In the future, as they have in the past, our members will always seek to protect the works that they create. The structure of our business has changed in the past and will do so in the future. The one and only constant in the debate over motion picture authorship and moral rights is the contribution of the artist. We maintain today, as we have for the past three decades, that screenwriters and directors are the only true authors of a motion picture, and that the United States government should afford them that recognition and the protections of Article 6 bis.

We thank you for including the issue of moral rights in your review.

/s/  
Kathy Garnezy  
Associate Executive Director  
Government & International Affairs  
Directors Guild of America, Inc.

/s/  
Charles B. Slocum  
Assistant Executive Director  
Writers Guild of America, West Inc.

cc: Members, House Judiciary Subcommittee on  
Courts, Intellectual Property, and the Internet



**BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY  
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY  
AND THE INTERNET**

**HEARING ON MORAL RIGHTS, TERMINATION RIGHTS, RESALE ROYALTY,  
AND COPYRIGHT TERM**

**STATEMENT OF THE LIBRARY COPYRIGHT ALLIANCE**

The Library Copyright Alliance (LCA) consists of three major library associations—the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries—that collectively represent over 100,000 libraries in the United States employing over 350,000 librarians and other personnel. In this statement, LCA addresses the negative effects that the present lengthy copyright term has on the public domain and the public interest.

The current copyright term in the United States is already unacceptably long, resulting in significant harm to the public domain and limiting access to these works. There is no policy justification or economic evidence to support extension of the current copyright term and LCA opposes any such efforts.

The Constitutional rationale for the intellectual property system is “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>1</sup> The Supreme Court has confirmed that this rationale is ultimately intended to serve the public:

Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an “author’s” creative labor. But the ultimate aim is, by this incentive, to stimulate creativity for the general public good.<sup>2</sup>

The first copyright term in the United States was set by the Copyright Act of 1790, modeled after the Statute of Anne (1710), and granted a period of protection of fourteen years for American authors, with a renewable period of an additional fourteen years. This term was meant to provide an incentive to creators by providing a limited time monopoly, while also aiming to create a balance, allowing the public to rely on these works once this limited period ended.

<sup>1</sup> U.S. Const., Art. I, Sec. 8, Cl. 8.

<sup>2</sup> *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

Since this first copyright act was enacted, several revisions to the term of protection were made, each lengthening the “limited time” granted to authors. In 1831, the term was revised to set the initial term at twenty-eight years, with a renewable term of fourteen years. The term was again revised in 1909, lengthening the renewable term to twenty-eight years. The Copyright Act of 1976 provided for a term of protection of the life of the author plus an additional fifty years, or seventy years for works for hire.

The term of protection in the United States was again extended through the Copyright Term Extension Act of 1998 to the current period of the life of the author plus seventy years or ninety-five years for works for hire. The term of copyright in the United States thus now significantly exceeds the international standard established under the Berne Convention of life plus fifty years.

Notably, as legal historian Edward Walterscheid has observed, while patents and copyrights were included in the same clause of the Constitution and originally had the same or similar durations, the patent term has increased by just 43 percent while the copyright term has increased by almost 580 percent.<sup>3</sup>

The continued extensions of copyright term hinder the stated Constitutional goal of the intellectual property system of serving the good by shrinking the public domain: works that are not under copyright protection. One study demonstrated that lengthy copyright term has resulted in the greater in-print availability of titles from the 1890s and early 1900s than from works published in the mid-twentieth century because the older works are known to be in the public domain and can be reprinted without determining whether a rights holder exists and negotiating a license for the printing.<sup>4</sup>

The public domain is a vital component of the cultural world. It not only allows the public to access books and texts, but also serves as a storehouse of raw materials from which derivative works and new ideas are built. Longer copyright terms lengthen the amount of time a work is protected thereby escalating the costs of access to knowledge by requiring licensing for a greater period of time, increasing the resources that must be devoted to searching for authors, and contributing to potential loss of materials.

It also should be noted that the lengthy copyright term extending far beyond the life of the author has exacerbated the orphan works problem: the rights to a particular work may pass on to the author’s heirs, his heirs’ heirs, or may be assigned to a third party and it can be extremely difficult to determine who holds the rights. Given the primary objective of the intellectual property system, the purpose of providing the limited term monopoly of copyright protection certainly was not intended to be a financial reward for the heirs of the creators.

<sup>3</sup> Edward Walterscheid, *Defining the Patent and Copyright Term: Term Limits and the Intellectual Property Clause*, 7 J. INTEL. PROP. L. 315, 389 (2000). Walterscheid further observes, “Congress must justify why a 20-year term can provide sufficient incentive to inventors, but not to writers and artists.”

<sup>4</sup> See Timothy B. Lee, *Why Does Amazon have more books from the 1880s than the 1980s? Blame Copyright?* WASH. POST (Jul. 31, 2013), available at <http://www.washingtonpost.com/blogs/the-switch/wp/2013/07/31/why-does-amazon-have-more-books-from-the-1880s-than-the-1980s-blame-copyright/>.

Register of Copyrights Maria Pallante concurs. In a speech advocating the reintroduction of copyright formalities for the last twenty years of protection, Ms. Pallante stated:

The benefits of a lengthy term are meaningless if the current owner of the work cannot be identified or cannot be located. Often times, this is complicated by the fact that the current owner is not the author or even the author's children or grandchildren. As the Copyright Office recognized in one of its key revision studies of the 1950s, it seems questionable whether copyright term should be extended to benefit remote heirs or assignees, "long after the purpose of the protection has been achieved."<sup>5</sup>

Efforts to amend the copyright term should be grounded in economic evidence. The independent Hargreaves report commissioned by the government of the United Kingdom noted that lengthier copyright terms do not incentivize further creation:

Economic evidence is clear that the likely deadweight loss to the economy exceeds any additional incentivising effect which might result from the extension of copyright term beyond its present levels. This is doubly clear for retrospective extension to copyright term given the impossibility of incentivising the creation of already existing works, or work from artists already found dead. Despite this, there are frequent proposals to increase term . . . The UK Government assessment found it to be economically detrimental. An international study found term extensions to have no impact on output.<sup>6</sup>

Similarly, in her 2011 article published in the *Review of Economic Research on Copyright Issues*, Ruth Towse noted that:

Almost all economists are agreed that the copyright term is now inefficiently long with the result that costs of compliance most likely exceed any financial benefits from extensions (and it is worth remembering that the term of protection for a work in the 1709 Statute of Anne was 14 years with the possibility of renewal as compared to 70 years plus life for authors in most developed countries in the present, which means a work could be protected for well over 150 years). Moreover, difficulties of tracing copyright owners and of so-called "orphan" works has prevented access to copyrighted material and inhibited both future creation and access to culturally valuable material by the public.<sup>7</sup>

<sup>5</sup> Maria Pallante, Register of Copyrights and Director, U.S. Copyright Office, *David Nelson Memorial Keynote Address: The Curious Case of Copyright Formalities* (Apr. 18, 2013), <http://www.law.berkeley.edu/files/Pallante-BerkeleyKeynote.pdf> (quoting U.S. COPYRIGHT OFFICE LAW REVISION, STUDY NO. 30, DURATION OF COPYRIGHT, at 80 (1961), available at <http://www.copyright.gov/history/studies/study30.pdf>).

<sup>6</sup> Ian Hargreaves, DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY GROWTH 19 (2011), <http://www.ipso.gov.uk/ipreview-finalreport.pdf> (citations omitted).

<sup>7</sup> Ruth Towse, *What We Know, What we Don't and What Policy-makers Would Like Us to Know About the Economics of Copyright*, 8 REVIEW OF ECONOMIC RESEARCH ON COPYRIGHT ISSUES 101, 105 (2011). Notably, this journal focusing on economic research on copyright did not exist at the time of the Copyright Term Extension Act. Since the last copyright term extension, there has been heightened interest in providing an



Longer copyright terms diminish the public domain, harm access to knowledge, worsen the orphan works problem, and are not grounded in economic evidence. Accordingly, LCA respectfully submits that Congress should not lengthen the present term any further. Indeed, we urge the Subcommittee and Congress to explore ways to shorten the present term and/or mitigate its harms by, for example, adopting Ms. Pallante's proposal to reintroduce formalities "by reverting works to the public domain after a period of life plus fifty years unless heirs or successors register their interests with the Copyright Office."<sup>8</sup>

July 15, 2014

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evidence basis for copyright policy. The Hargreaves Report, for example, recommended "that in future, policy on Intellectual Property issues is constructed on the basis of evidence . . .".

<sup>8</sup> Statement of Maria A. Pallante, Register of Copyrights, *The Register's Call for Updates to U.S. Copyright Law*, United States Copyright Office before the Subcommittee on Courts, Intellectual Property and the Internet, Committee on the Judiciary, 113 Cong., 1st Sess., (Mar. 20, 2013), available at <http://www.copyright.gov/regstat/2013/regstat03202013.html>. By requiring registration during the last twenty years of protection, numerous works would likely enter the public domain. For those works that are renewed for an additional twenty years, the rightholder would be more easily identified and found.

Testimony of  
Public Knowledge

Before the  
U.S. House of Representatives  
Committee on the Judiciary  
Subcommittee on Intellectual Property, Competition, and the Internet

Hearing On: Moral Rights, Termination Rights, Resale Royalty, and Copyright Term

July 15, 2014

Dear Chairman Goodlatte, Ranking Member Conyers, and members of the Committee:

It is a privilege to submit the following testimony for the record in this hearing on copyright termination and copyright terms. Public Knowledge (PK) is a non-profit organization that advocates for the public's access to knowledge and open communications platforms.

The topics the Committee is examining in this hearing are tremendously important for encouraging creativity and protecting everyday people and professional artists alike. In this testimony, Public Knowledge urges Congress to ensure artists have meaningful access to a robust copyright termination right and to enrich the public domain by shortening copyright terms to the life of the author plus 50 years.

**Copyright Termination of Transfers**

The copyright reclamation right gives artists the ability to tear up their copyright transfers or licenses after 35 years. This right has the potential to transform the recorded music business. The right of authors to terminate transfers of their copyrighted works<sup>1</sup> has the potential to empower artists to reclaim control over their own works and promote accountability among intermediaries that aggregate artists' copyrights.<sup>2</sup>

The copyright termination right promises to empower artists across all types of creative works, but will have some unique impacts on the recorded music industry, which has traditionally been plagued by the imbalance of power between the major record labels and artists. Copyright reclamation allows recording artists to take their sound recording copyrights back from the record labels, which have for decades relied on owning massive catalogs of copyrights for their business models. For too long the music industry's incumbent middlemen have used their leverage as industry gatekeepers to squeeze artists and consumers alike, while burdening the development of new distribution platforms that threaten to make them obsolete. But the

<sup>1</sup> This right is sometimes referred to as copyright termination or copyright reclamation.

<sup>2</sup> Public Knowledge's recent white paper on copyright termination and the music business give further detail on the mechanics of copyright terminations and recording contracts. See Jodie Griffin, *Rewind, Reclaim: Copyright Termination and the Music Business*, PKTHINKS (Mar. 2014), <https://www.publicknowledge.org/documents/rewind-reclaim> ("Rewind, Reclaim").

termination right, which first took effect in 2013, will allow artists to reclaim control over their own works or negotiate better deals with their current business partners.

As the termination right created in Section 203 of the Copyright Act has only just recently ripened for some musicians, Public Knowledge makes the following recommendations to Congress:

1. PK urges Congress to monitor any ongoing litigation over the termination right, authorship, and works made for hire and ensure that all artists continue to have a meaningful right to terminate.<sup>3</sup>
2. Public Knowledge also asks Congress to instruct the Copyright Office to create a form by which artists could file termination notices, to facilitate artists' exercise of their rights.
3. Finally, Public Knowledge asks Congress to consider the questions posed by licenses granted for free to the general public, such as Creative Commons or open source licenses. These licenses may be sufficiently different from typical private contracts as to merit separate treatment to protect good faith follow-on creators.

*Why Should Artists Be Able to Terminate Their Contracts?*

Decades after Congress gave artists the right, copyright termination has indeed turned out to be desperately needed in an industry plagued by poor treatment of artists and imbalanced power structures that only hinder new works from reaching the public.

Congress's stated reasons for creating the termination right fit into two main categories. First, the termination right was designed to protect actual artists who struck bad deals with record labels or publishers. Most of those lopsided deals were the result of the fact that even an artist who shows obvious musical promise will have relatively little leverage or savvy compared to the labels and publishers she will be striking deals with. For example, Joanna "JoJo" Levesque recently sued Blackground Records, a subsidiary of the major label Universal Music Group, to escape the record contract she made as a 12-year-old just entering the music business.<sup>4</sup> JoJo alleged that her label refused to release her third album after she delivered multiple master recordings, failed to pay producers and thus hurt her working relationships in the industry—all of which was enabled under the terms of her recording contract because she had little to no leverage as an undiscovered act. JoJo was ultimately able to escape her record deal—10 years after the fact—but artists who were adults when they struck their deals may not be so lucky.<sup>5</sup>

However, with the copyright termination right, artists can have a second bite at the apple regardless of their age or their leverage when they struck their deals. For example, Prince recently announced that he had negotiated a new deal with Warner Bros. Records in which he

<sup>3</sup> For example, the parties in two lawsuits (*Shuster v. DC Comics* and *Kirby v. Marvel Characters, Inc.*) related to copyright termination have petitioned the Supreme Court to review their cases. Both requests are still pending.

<sup>4</sup> Complaint, *Joanna Levesque v. Da Family Records, LLC* (N.Y. Sup. Ct., July 29, 2013).

<sup>5</sup> Gerrick Kennedy, *Exclusive: JoJo Signs Deal with Atlantic Records*, L.A. TIMES MUSIC BLOG (Jan. 14, 2014), <http://www.latimes.com/entertainment/music/posts/la-et-msexclusive-jojo-deal-atlantic-records-20140114,0,3524459.story>.

would regain ownership over his catalog.<sup>6</sup> After famously breaking from his label and condemning the way major labels treat artists, reports indicate the copyright termination right has allowed Prince to reclaim his rights and strike a more fair deal that reflects his career priorities.

Congress also recognized that it can be hard for anyone to tell how successful a work will be before it reaches the market. 35 years into a deal, the termination right to empowers artists to renegotiate for a royalty based on how the work actually performed in the marketplace.<sup>7</sup> When a work turns out to command a higher price in the market than the original bargain contemplated, the copyright reclamation right empowers the artist to negotiate for the actual value of the work.<sup>8</sup> For example, in the 1930s Jerome Siegel and Joseph Shuster collaborated to create a comic book villain named “The Superman,” which they re-worked into a hero named “Superman” and sold to Detective Comics for \$130 and a small per-page rate that lasted 5 years.<sup>9</sup> Using the termination provisions available to pre-1978 works,<sup>10</sup> the heirs re-gained the copyright in 2008, giving them the power to negotiate licenses that actually reflected the value of the comics.<sup>11</sup>

#### *Termination Can Help Create a Better Music Industry*

Having the benefit of hindsight, we can also see why copyright reclamation is so desperately needed to reset the balance of power in the recorded music industry and direct more royalties to actual artists. Record industry practices have too often systematically denied equity to the very people copyright law was designed to incentivize—actual artists—while entrenching the dominance and anticompetitive incentives of the industry’s largest middlemen, like the major record labels. If a substantial number of artists use their right to terminate transfers with the largest music industry middlemen, musicians will likely retain more control over their own careers and the institutions that define the industry, and receive a more proportionate return on their works. This would in turn give record labels some incentive to treat artists better or risk losing their business when the artist’s termination right matures.

Copyright reclamation could also be a boon for the development of new online music distribution platforms. Artists who reclaim their rights will regain the ability to license with online platforms that distribute music to consumers. Or, if artists choose to continue using intermediaries to strike distribution deals, they could use copyright reclamation to move their licenses to another company. This has the potential to shake up the current power structures in the recorded music business, as major labels see their sizeable copyright catalogs shrink and

<sup>6</sup> Ed Christman, *Prince Gains His Catalog in Landmark Deal with Warner Bros.; New Album Coming*, BILLBOARD (Apr. 18, 2014), <http://www.billboard.com/articles/news/6062423/prince-deal-with-warner-bros-new-album-coming>.

<sup>7</sup> See H.R. Rep. No. 94-1476, at 124 (“A provision of this sort is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work’s value until it has been exploited.”).

<sup>8</sup> *Stewart v. Abend*, 495 U.S. 207, 229 (1990).

<sup>9</sup> *Siegel v. Warner Bros. Entm’t Inc.*, 542 F. Supp. 2d 1098, 1102-07 (C.D. Cal. 2008).

<sup>10</sup> See § 304.

<sup>11</sup> *Siegel v. Warner Bros.*, 542 F. Supp. 2d at 1145.

subsequently lose the leverage they have previously used to veto or demand outsized payments or ownership stakes from new distribution platforms.<sup>12</sup>

To date, new online distribution platforms for sound recordings have needed to get direct permission from record labels, and the dominance of the three major labels (due to their enormous copyright holdings) have given those labels the market power to burden, control, or entirely shut down new platforms that enable artists to more directly and effectively reach their fans. But, if the termination right leads to smaller copyright holdings for the major labels or more limited renegotiated contracts with artists, the majors would not be able to exercise so much control over the development of the digital music space. This could also level the playing field between the major labels and smaller distribution middlemen, who would need to compete against each other to attract artists by offering more efficient operations and better rates for the actual musician.

As detailed in Public Knowledge's white paper, the major record labels have developed a reputation for using their market power as leverage against their own artists as well as against distribution platforms.<sup>13</sup> As a result, recording contracts too often give artists a disproportionately small share of the revenues from an album, and keep artists in debt to the label over the course of several album cycles. Unfortunately, a new unsigned band has little leverage against a major record label and faces an uphill battle if they want to change any of the many terms in the contract that disadvantage the artist.

#### *The Importance of the Termination Right*

Copyright reclamation does not right all of these wrongs, but it gives the artist a chance to reclaim control over her work or simply renegotiate for a better deal after they have the leverage of a proven musical career and fan base.

It could be that many artists will prefer to simply strike a better deal with the same labels they have always worked with. Or, artists may opt to terminate their contracts entirely, take back their own copyrights, and pursue an independent career using new digital platforms to handle their own distribution.<sup>14</sup>

If a critical mass of artists choose this path the termination right may actually end up having a structural impact on the music industry: as the major record labels lose the aggregated rights they had collectively leveraged to veto or burden new online distribution platforms, more

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<sup>12</sup> See Testimony of Gigi B. Sohn on Behalf of Public Knowledge and Consumer Federation of America, *The Universal Music Group/EMI Merger and the Future of Online Music*, U.S. Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy, and Consumer Rights, at 6-10 (June 21, 2012), available at <http://publicknowledge.org/files/Gigi%20Sohn%20Testimony%20-%20UMG-EMI%206-21-12.pdf>.

<sup>13</sup> *Rewind, Reclaim* at 8-12.

<sup>14</sup> Many artists do indeed prefer to maintain independent music careers, even when they have the option of signing to a major label or publisher. For example, the Shook Twins recently explained why they prefer an independent music careers in an open letter to American Idol. Chris Robley, *Thanks, But No Thanks: Shook Twins Tell American Idol to Take a Hike*, THE DIY MUSICIAN (July 10, 2014), <http://diymusician.cdbaby.com/2014/07/thanks-thanks-shook-twins-tell-american-idol-take-hike/>.

entrepreneurs may invest in the distribution business and more digital platforms may arise to reach consumers in new and innovative ways.

As these changes take place, the copyright termination right also gives unrepresented groups of artists the opportunity to increase their leverage and balance the power in a system that has traditionally exploited their music without allowing them to gain equity in the institutions that control their work.<sup>15</sup> Record label contracts are often structured such that albums will never earn back the money originally fronted by the label for an album's production and promotion, so the label never passes on any royalties to the actual artist. Even if the artist is lucky enough to "recoup" the label's expenses and begin collecting royalties, that artist still only receives a small portion of the total revenue from that recording, and gains no equity in the companies that profit so richly from the album. And as record labels now increasingly use their artists' copyrights to demand equity from online music platforms, it remains unclear whether the labels' artists' ever see any of the benefit of those ownership shares. This system of exploitation is yet greater for artists from historically underrepresented communities, like African American musicians. As Professor Kevin J. Greene put it, "While it is true that the music industry has generally exploited music artists as a matter of course, it is also undeniable that African-American artists have borne an even greater level of exploitation and appropriation."<sup>16</sup>

#### *Open-Content Projects*

Congress has established the termination provisions largely to protect authors from unremunerative transfers when they have little bargaining power, but the statute does not actually make unequal bargaining power a condition for the termination right. As a result, termination can have unintended consequences for situations that don't involve unequal negotiation leverage. One of those situations is when an author publishes a work under a free or open-source license (referred to collectively as "open-content" for this testimony). An author may use this type of license to grant the public a perpetual license to copy, distribute, and/or modify her work without needing to ask for individual permission.

These licenses, however, are very likely constrained by the termination provisions of § 203, and thus can be terminated by the original author after 35 years. Once an open-content contributor terminates her license, no future authors may rely upon that license to continue

<sup>15</sup> See Kevin J. Greene, "Copynorms," *Black Cultural Production, and the Debate Over African American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179, 1184 (2008) ("Further, given their corporate nature as successors in ownership, the class of beneficiaries (primarily music publishers and record labels) that profited at the expense of Black artists are both identifiable and continue to benefit given the long terms of copyright protection. This point is underscored by the recent copyright extension that reflected a policy choice to provide a windfall to the largest IP distributors."); Kevin J. Greene, *What the Treatment of African American Artists Can Teach About Copyright Law*, INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE, 387 (Peter Yu ed., 2007), ("The [music] industry routinely deprived Black artists of the two fundamental predicates of intellectual property protection—credit and compensation."). For example, major record labels went decades without paying any royalties at all to legendary African American artists from the 1940s and 1950s like Muddy Waters, Wolf, Buddy Guy, Bo Diddly, and the Soul Stirrers. See Richard Harrington, *MCA to Pay Royalties to R&B Greats*, WASH. POST (Dec. 7, 1989).

<sup>16</sup> Kevin J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 Hastings Comm. & Ent. L.J. 339, 341 (1999).

building on her work. Furthermore, if the work is intermingled within a larger project like Wikipedia or the code for an open-source computer program, it could be very difficult to accurately extract the terminating's author's contributions from the rest of the work.

Some licenses, like the GPLv3 license, purport to be irrevocable, and Creative Commons has gone so far as to create a CC Public Domain Dedication,<sup>17</sup> which attempts to put the work in the public domain, but the termination provision could prevent either of these license from being fully effective.<sup>18</sup> For one thing, both licenses would conflict with the statutory heirs' rights under § 203(a)(2), even if the author died wishing for the work to be available for free.

Open-content brings a number of benefits to society, including: minimizing transaction costs, facilitating uses that would not otherwise occur, creating a commons of raw materials that can be used by any member of the public, and, in the software context, allowing programmers to work together outside of a large firm by letting them adapt and reuse one another's code without fear of liability.

The open-content problem could be solved legislatively in a few ways. First, the law could be amended to include a mechanism for authors to voluntarily put their works in the public domain before the end of the copyright term. Authors could still choose to use open-content licenses instead, but those licenses would likely still be terminable. This might divide advocates for artists, however, because although it gives artists another choice in how to distribute their works, it would also foreclose an author from retrieving those works from the public domain later, regardless of the commercial value of the work.

Second, the termination provision could be amended to include an exception for licenses granted overtly and explicitly to the public at large without monetary consideration. This would somewhat mirror how § 203(a) currently handles works made for hire.

Finally, the termination provisions could be amended to grant the Librarian of Congress the authority to issue exceptions from the termination mechanism. This option would be the most complicated and present the most risk. If this mechanism is not structured properly it could create even more confusion; for example, as to whether the exception applies to works existing at the time of the rulemaking or licenses drafted before the next rulemaking.

The termination right offers the opportunity to reexamine the current power structures that dominate the music industry and rebalance control and revenue based on the legitimate value that each party provides. Copyright termination has the potential to empower artists and increase artists' incentives to create new works for the public to enjoy, which ultimately serves the fundamental purpose of copyright law. There are, however, many pitfalls to the copyright termination right, and it remains to be seen if the system operates as Congress and the public expects it will. If powerful copyright owners and licensees are able to avoid or diminish the

<sup>17</sup> *Creative Commons Legal Code*, <http://creativecommons.org/publicdomain/zero/1.0/legalcode>.

<sup>18</sup> This has never been tested in court, although the outcome might also be influenced by the courts' jurisprudence on abandonment. See *Capitol Records, Inc. v. Naxos of Am., Inc.*, 372 F.3d 471, 483 (2d Cir. 2004) (copyright abandonment requires "(1) an intent by the copyright holder to surrender rights in the work; and (2) an overt act evidencing that intent."); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1026 (9th Cir. 2001) ("waiver is the intentional relinquishment of a known right with knowledge of its existence and the intent to relinquish it,") (quoting *United States v. King Features Entm't, Inc.*, 843 F.2d 394, 399 (9th Cir. 1988)).

benefits that copyright termination provides to artists, consumer advocates, artist representatives, and Congress must be ready to remedy the system and ensure that copyright reclamation actually serves its purpose.

### Copyright Term

The length of copyright protection is a crucial factor to copyright law's success in enabling people to experience and build on their own cultural foundations. At its core, copyright law exists to benefit the public, which it does by incentivizing authors to create through the grant of temporary monopolies.<sup>19</sup> It is clear that, while a certain level of copyright protection ultimately serves the public interest, *more* is not always *better*. Both as a matter of Constitutional requirement and wise public policy, there must come a time when we recognize works' place in the cultural commons we all enjoy and build upon, and limit the term of copyright.

It has also become evident that the current term of copyright protection is too long, resulting in an increasingly outdated public domain and exacerbating the orphan works problem. Public Knowledge therefore urges Congress to limit the term of copyright protection to life plus 50 years, and to investigate the copyright term that would best incentivize creation while maximizing the availability of works to the public, with a heavy emphasis on economic analysis.

Although originally set at 14 years (with an option to renew for a second 14 year term), a succession of bills have extended the length of copyright protection for most works to the entire life of the author plus an additional 70 years. Expanding the term of copyright comes at a cost. By giving an author a monopoly on an expression, it prevents other people from building on that expression to create new works. Shortening the term of copyright to life plus 50 years would enrich the public domain by shortening the term of protection, while still maintaining compliance with international treaty obligations.

The proposal shortens copyright terms to the minimums established by the Berne Convention on the Protection of Literary and Artistic Works. This reduces the copyright term for most works to the life of the author plus 50 years, and reduces the term of protection for anonymous works, pseudonymous works, and works made for hire to 50 years from first publication. To prevent unpublished works from having an unlimited copyright term, anonymous works, pseudonymous works, and works made for hire will also have their copyright term expire 75 years from the date of their creation, if 50 years have not yet passed from the date of their publication.

Public Knowledge is not alone in questioning whether life plus 70 years is the appropriate term length. The Register of Copyrights recently suggested that Congress consider a term of life plus 50 years, with a 20-year extension contingent upon registration.<sup>20</sup> A group of prominent economists—including five winners of the Nobel Memorial Prize in Economic Sciences—have explained that the increase in protection from life plus 50 years to life plus 70 years gave at best

<sup>19</sup> U.S. Const. Art. I, § 8, cl. 8.

<sup>20</sup> Statement of Maria Pallante, *The Register's Call for Updates to U.S. Copyright Law*, House Committee on the Judiciary, Subcommittee on Courts, Intellectual Property, and the Internet (Mar. 20, 2013), available at <http://www.copyright.gov/regstat/2013/regstat03202013.html>.



a very small benefit while imposing significant costs.<sup>21</sup> Given the increasing number of voices arguing that the current copyright term actually thwarts economic and cultural innovation, it falls to Congress to inquire into what term would strike the proper balance.

Finding the optimal term for copyright is a crucial part of achieving the best possible copyright law. Public Knowledge urges Congress to take one small step toward making the term of copyright protection in line with the best interests of everybody while beginning thorough economic analysis to arrive at the best copyright term to promote innovation and the creation of new works.

Jodie Griffin  
Senior Staff Attorney  
Public Knowledge

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<sup>21</sup> Amicus Curiae Brief of George A. Akerlof et al., *Eldred v. Ashcroft*, No. 01-618 (U.S., May 20, 2002), available at <https://cyber.law.harvard.edu/openlaw/eldredvashcroft/supct/amici/economists.pdf>.

July 22, 2014

Honorable Robert Goodlatte  
Chairman  
House Judiciary Committee  
2138 Rayburn House Office Building  
Washington, DC 20515

Re: House Judiciary Subcommittee on Courts, Intellectual Property and the Internet's July 15, 2014  
Hearing on "**Moral Rights, Termination Rights, Resale Royalty and Copyright Term**"

Dear Chairman Goodlatte:

On behalf of Sotheby's Inc. and Christie's Inc., we would like to submit for the July 15, 2014 record the comments that our companies filed in the *Copyright Office's Notice of Inquiry re Resale Royalty Right*, (Docket No. 2012-10, 77 Fed Reg. 58175 Sept. 19, 2012).

Thank you for including these comments in the hearing record.

Respectfully Submitted,

Sotheby's, Inc.

/s/

Jonathan Olsoff, North American General Counsel, Senior Vice-President  
1334 York Avenue  
New York, NY 10021  
212 606 7000

Christie's Inc.

/S/

Sandra Cobden, Senior Vice President and General Counsel, Dispute Resolution  
20 Rockefeller Plaza  
New York, NY 10020  
212 636 2000

## COVINGTON &amp; BURLING LLP

ONE FRONT STREET  
SAN FRANCISCO, CA 94111-5306  
TEL 415.591.6000  
FAX 415.591.6091  
WWW.COV.COM

BEIJING  
BRUSSELS  
LONDON  
NEW YORK  
SAN DIEGO  
SAN FRANCISCO  
SILICON VALLEY  
WASHINGTON

SIMON J. FRANKEL  
TEL 415.591.7052  
FAX 415.555.6552  
SFRANKEL@COV.COM

December 5, 2012

*Via Electronic Submission*

Maria Pallante  
Register of Copyrights  
United States Copyright Office  
Library of Congress  
101 Independence Avenue, S.E.  
Washington, D.C. 20559-6003

Re: *Comments of Sotheby's, Inc. and Christie's Inc. in Response to  
Copyright Office's Notice of Inquiry re Resale Royalty Right,  
Docket No. 2012-10, 77 Fed. Reg. 58175 (Sept. 19, 2012)*

Dear Ms. Pallante:

I am writing on behalf of Sotheby's, Inc. and Christie's Inc. (together, the "Auction Houses") in response to the Copyright Office's Notice of Inquiry dated September 13, 2012, published in the *Federal Register* on September 19, 2012, 77 Fed. Reg. 58175 ("Notice of Inquiry"). The Notice of Inquiry sought comment on "the means by which visual artists exploit their works under existing law as well as the issues and obstacles that may be encountered when considering a federal resale royalty right in the United States." *Id.* at 58175. The Auction Houses welcome the opportunity to respond to the questions raised in the Notice of Inquiry.

# **I. Introduction and Summary**

Sotheby's, headquartered in New York, and Christie's, headquartered in London, are the world's two largest auction houses. Together, the Auction Houses employ more than 1,300 people in the United States and account for nearly \$4 billion in sales in this country. In keeping with the international nature of the art market, the businesses of the Auction Houses are highly globalized, with a large percentage of transactions involving sellers and buyers from around the world, and each of the Auction Houses conducts auctions in many locations outside of the U.S., including Europe, China, and the Middle East. At the same time, the Auction Houses recognize that their long-term success depends in part on the existence of a thriving primary market for living artists. For these reasons, the Auction Houses have a strong interest in the continued success of the U.S. art market and are well positioned to assess the many factors that can add to, or detract from, that success.

## COVINGTON &amp; BURLING LLP

Maria Pallante  
 December 5, 2012  
 Page 2

The Auction Houses believe that there is no reason to adopt a federal resale royalty right in the United States and many important reasons not to.<sup>1</sup> As an initial matter, the concept of a resale royalty does not fit within the framework of U.S. copyright law, as discussed in detail in the separate comments submitted on behalf of the Auction Houses by Paul Clement of Bancroft PLLC. In Europe—where the resale royalty right, or *droit de suite* (“the right to follow”), originated in the early 1900s—copyright is treated as an extension of the author’s personality. Copyright in the United States, however, is primarily economic in nature, grounded in the constitutional mandate “[t]o promote the progress of science and the useful arts.” U.S. CONST., Art. 1, § 8, Cl. 8. Under the U.S. model, copyright law seeks to balance the author’s incentive to create new works against the public interest in accessing and using such works. A resale royalty right would upset this balance by likely reducing the prices paid to artists in the primary market for their works, as discussed below, while providing artists with little or no additional incentive to create. In particular, it would interfere with the first sale doctrine, codified at 17 U.S.C. § 109(a), which allows the purchaser of a physical object embodying a copyrighted work to freely dispose of that object while ensuring that the author retains copyright in the underlying work. A resale royalty right would give artists a perpetual ownership interest in the object as well, contrary to traditional notions of property rights under U.S. law.

In addition to the doctrinal difficulties it presents, the resale royalty right offers no practical benefits. As explained in detail below, proposals for resale royalty legislation are an attempt to solve a problem that does not exist. U.S. copyright law already enables artists to exploit the full value of their works—even when some of those works are later resold by a collector or investor—through the primary art market for first sales, with the possibility of additional income from licensed reproductions such as prints and merchandise. Further, because only a tiny percentage of artworks are ever resold, the vast majority of artists would gain nothing from a resale royalty, which would instead provide a new stream of revenue to already very successful artists.

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<sup>1</sup> The Auction Houses are not alone in reaching this conclusion. As noted below, numerous prominent artists in Europe have opposed the right precisely because of its unequal and ineffective impact. And of the fifteen states in this country to consider the issue, including Florida, New York, Nevada, Ohio, and Texas, only one—California—has adopted a resale royalty, with little success even before the law was recently held unconstitutional. See Gilbert S. Edelson, *The Case Against an American Droit de Suite*, 7 CARDOZO ARTS & ENT. L.J. 260, 266 (1989) (“The California Resale Proceeds Right Law, enacted in 1976, was followed by an immediate down-turn in the local art market. It is well known that the law has been widely evaded over the years, allowing the California art market to recover to a great extent, particularly in Los Angeles. Nonetheless, actual damage did result from California’s Resale Royalty law.”); see also *Graham v. Sotheby’s, Inc.*, 860 F. Supp. 2d 1117 (C.D. Cal. 2012) (holding California resale royalty statute violates Commerce Clause).

## COVINGTON &amp; BURLING LLP

Maria Pallante  
 December 5, 2012  
 Page 3

Yet not only would a resale royalty right fail to solve any problems, it would also create several new ones. The economic effect of a resale royalty would likely be to depress the prices that buyers are willing to pay for a work when it is first sold. This means that the vast majority of artists, whose works are never resold and tend to decline in value after initial sale, would lose money on first sales of their works that they would be unable to recover later through resales. Depressed sale prices and increased administrative costs would in turn lead to reduced investment in young, unproven artists—the very artists that the resale royalty is intended to benefit. And by imposing what is in effect a tax on art resale transactions, U.S. resale royalty legislation would likely drive those sales, especially sales of the highest-profile works, to countries that do not impose the same restrictions (or impose less onerous restrictions), with negative implications for the local and national economies.

These are the same conclusions that the Copyright Office reached twenty years ago in its 1992 report, in which it found insufficient “economic and copyright policy justification” to establish a resale royalty in the United States. Copyright Office, *DROIT DE SUIITE: THE ARTIST’S RESALE ROYALTY* 149 (1992) (“1992 Report”). Nothing since 1992 has changed that would now support the implementation of the resale royalty. Rather, the only major development has been the European Union’s decision in 2001 to harmonize resale royalty legislation implementing the right across all EU member countries. See Council Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the Resale for the Benefit of the Author of an Original Work of Art, art 1, 2001 O.J. (L 272) 32-36. Data from the implementation of the EU directive—particularly in the United Kingdom, which, like the U.S., had previously studied and rejected the resale royalty right, and which also opposed the EU directive—confirms the 1992 Report’s findings: a resale royalty does not offer benefits that justify its burdens. The Copyright Office should therefore renew its recommendation to Congress not to enact resale royalty legislation in any form.

## II. Resale Royalty Legislation Is a Solution in Search of a Problem

### A. Artists and the Primary Art Market

An understanding of how fine art is typically marketed and sold helps to understand why the resale royalty does not (and need not) have a role in U.S. law. Speaking simply, the art market consists of two main components: the primary market and the secondary market. In the primary market, an artist sells her work directly to a buyer, often with the assistance of an intermediary such as a dealer (to whom the work will typically be consigned for sale to potential buyers). In the secondary market, the person who initially bought the work from the artist has the opportunity to resell that work to a secondary buyer. Auction houses are only one part of the secondary market, which also includes substantial private sales by dealers. See, e.g., Alexandra Peers, *Qatar Purchases Cézanne’s The Card Players for More Than \$250 Million, Highest Price Ever for a Work of Art*, VANITY FAIR, Feb. 2, 2012, <http://www.vanityfair.com/culture/2012/02/qatar-buys-cezanne-card-players-201202> (reported

## COVINGTON &amp; BURLING LLP

Maria Pallante  
 December 5, 2012  
 Page 4

private sale); *Sonnabend estate sold for \$600m*, THE ART NEWSPAPER, May 1, 2008, <http://theartnewspaper.com/articles/Sonnabend-estate-sold-for-600m/8510> (artworks in estate of late art dealer Ileana Sonnabend reportedly sold in two private transactions for \$600 million).

The primary market is the main or exclusive source of income for almost all American artists, and it is how most art is distributed in the United States. The secondary market, by contrast, revolves around the works of only a very small group of elite artists. A study from 1999 estimated that only 357 out of a projected 233,000 American artists—approximately 0.15 percent—had seen one of their works resold at a price of \$1,000 or more. See Jeffrey C. Wu, *Art Resale Rights and the Art Resale Market: A Follow-Up Study*, 46 J. COPYRIGHT SOC'Y U.S.A. 531, 543-44 (1999). This small group was dominated by the most successful artists of the time, including Willem De Kooning, Jasper Johns, and Roy Lichtenstein. *Id.* The resale market remains just as heavily skewed today: In 2010, the works of 831 artists of any nationality were sold at auction in the United States, and at most 380 of them were American. See Clare McAndrew, THE GLOBAL ART MARKET IN 2010: CRISIS AND RECOVERY 112-125 (TEFAF 2011) ("2011 TEFAF Report"). For the vast majority of individuals who regard themselves as full-time artists—more than 99.8 percent, according to the 1999 study—the secondary market holds little significance.

The lack of a secondary market has not prevented average American artists from supporting themselves financially. Indeed, the notion of the "starving artist" has long been discredited. A 1986 study found that, based on an analysis of census data, "there is no basis for concluding that artists earn any less on average than they would in other jobs." Randall K. Filer, *The "Starving Artist"—Myth or Reality? Earnings of Artists in the United States*, 94 J. POL. ECON. 56, 73 (1986). There is no reason to think that the economic situation of American fine artists has declined. Recent statistics from the Bureau of Labor Statistics estimate that in 2010 the median annual wage for jobs for fine artists, including painters, sculptors, and illustrators, was \$44,850; by comparison, the median annual wage for all occupations in the United States was \$33,840. See Bureau of Labor Statistics, National Employment Matrix, Selected Occupational Projections Data, available at <http://data.bls.gov/ocp/noeted?Action=empoccp>.

Thus, as the Copyright Office recognized in its 1992 Report, "[t]he notion of starving artists being exploited by wealthy, savvy investors does not do justice to reality." 1992 Report at 140. And with the secondary market restricted to only the most well-known (and already very well-compensated) artists, few—if any—artists are in the position where their works are being resold for large profits yet they themselves are struggling to make ends meet. Accordingly, there is no basis to conclude that most American artists are in need of, or would benefit from, a resale royalty.

## COVINGTON &amp; BURLING LLP

Maria Pallante  
 December 5, 2012  
 Page 5

**B. Fairness of the Copyright Act to Visual Artists**

Another broad rationale often advanced for a resale royalty right—that it is necessary to put visual artists on equal footing under the Copyright Act, *see* S. 2000, 112th Cong. (2011) (referred to as the “*Equity* for Visual Artists Act of 2011”)—also does not survive serious scrutiny. Visual artists already receive equitable treatment under the law as compared to other authors entitled to copyright protection. For all creators, U.S. copyright law applies the same basic trade-off: Under the first sale doctrine, codified in Section 109(a) of the Copyright Act, once the author of a work sells a piece that embodies the work, he or she is not entitled to further compensation should that piece be sold again, yet the author generally retains copyright in the underlying work. *See* 17 U.S.C. § 202.

That said, the very nature of different forms of creative work supports different types of business models. For example, a playwright earns money mainly from performances of her play, although she might also sell a few printed copies of the script. In contrast, a novelist’s primary source of income is selling hardcover, paperback, or e-book copies of his novel, although he might also be able to license that novel to be adapted for stage or screen. Meanwhile, as described above, the painter makes most of her money from the sale of her original painting, which, as a unique object, will likely sell for more than a copy of a novel, or than a reproduction of the painting. However, because the artist ordinarily continues to hold the copyright in the image of her painting, she might *also* license the work for use in limited-edition prints, merchandise, and other commercial reproductions, if there is a market for such uses. Indeed, some contemporary visual artists (consider the graphic works of Barbara Kruger, combining photographs with blocks of words) might make much of their income from sales of reproductions of their works.

None of these models is inherently more lucrative—or fair—than the others. As the Notice of Inquiry observes, a novelist has “numerous opportunities . . . to earn income from the original novel without having to write another book or restrict the number of books available for purchase in the marketplace.” Notice of Inquiry at 58176. Such opportunities, however, will prove valuable only if there is sufficient demand for that novel. The same is true of a painting—the only difference is that, as the 1992 Report found, “the value of works of art is determined by scarcity,” so “works of fine art do not require the same level of demand to secure a living for the artist.” 1992 Report at 130. What matters is not whether the painter has the same opportunities to sell reproductions, but whether there is demand for the work itself. And because the level of demand necessary to support a painter is lower than for the author of a mass-reproduced novel, “it may be argued nevertheless that the copyright scheme, in fact, favors these artists.” *Id.*

There is therefore nothing unfair, or even unique, about the circumstances of visual artists under U.S. copyright law. After all, visual artists are not the only copyright holders whose ability to sell multiples of their works is limited. Architects work within similar constraints, as their works (architectural drawings) are embodied in physical objects (buildings),

## COVINGTON &amp; BURLING LLP

Maria Pallante  
 December 5, 2012  
 Page 6

neither of which is likely to have a market for reproductions. At the same time, many visual artists whose works might be covered by resale royalty legislation, such as sculptors and photographers, *are* able to sell multiples of their works. If they choose not to do so (or to do so only sparingly), it is because they believe they will benefit from such scarcity—that is, they have decided they will earn more money by selling fewer copies at a higher price than they would by selling a greater number of copies at a lower price. Put another way, the unsuccessful songwriter is no better off than the unsuccessful sculptor; the songwriter does not benefit from being able to sell multiple copies of a song if few want to buy it. Similarly, the successful painter is much better off than the unsuccessful novelist, even if the latter has, in theory, a convenient market for multiples.

Visual art is also not unique in that its value derives from its scarcity. The Notice of Inquiry suggests that, because “the value of [a work of art] is based on its originality and scarcity,” “it may be a collector or other downstream entity that will derive the most financial benefit” from the sale of that original. Notice of Inquiry at 58176. This may be true, but it is equally true of a manuscript (or first edition) of a famous book, or the original sheet music of a famous symphony. In each scenario, the physical object that embodies the copyrighted work is valuable precisely because so few of its kind exist and there is sufficient demand for the “original.”

Hence, copyright law provides all authors with the same bundle of rights, but the varying business models most appropriate for different forms of expression—books, songs, paintings, etc.—may mean that certain rights under Section 106 of the Copyright Act will have greater or lesser value depending on the category of work. Granting the authors of works of visual art *additional* rights would not remedy an inequity, but create a new one.

### C. Creating and Capturing the Value of an Artist’s Work

For these reasons, artists are already able to fully exploit the value of their works without the intervention of a resale royalty. Because most works are never resold, as discussed above, in the majority of cases the first sale *is* the full value of the work. Indeed, “it is an economic reality that most art depreciates in value,” 1992 Report at 137, so the first sale typically represents the highest price that anyone will be willing to pay for the work—and that payment goes to the artist.

Artists (and their estates) often supplement this first sale income by licensing their works for limited-edition prints, merchandise, and other commercial reproductions. Popular websites like Ebay and Etsy have created additional opportunities for artists of all kinds to develop a market for derivative uses of their work. See, e.g., eBay, Prints: 2000–Now, [http://www.ebay.com/sch/Prints-/360/i.html?\\_dmp=Art\\_Prints&Date%2520of%2520Creation=2000%2520Now&rt=nc](http://www.ebay.com/sch/Prints-/360/i.html?_dmp=Art_Prints&Date%2520of%2520Creation=2000%2520Now&rt=nc); Etsy, Digital Illustrations, [http://www.etsy.com/browse/art/drawing-illustration/digital?h=826a65c6&lid=112962511&ref=cat\\_subcat\\_tile\\_4](http://www.etsy.com/browse/art/drawing-illustration/digital?h=826a65c6&lid=112962511&ref=cat_subcat_tile_4).



## COVINGTON &amp; BURLING LLP

Maria Pallante  
 December 5, 2012  
 Page 7

And in those rare instances when an artist's work is resold in the secondary market, the resale also inures to the benefit of the artist. Contrary to the Notice of Inquiry's suggestion, the collector or investor who resells a work for a profit does not "benefit exclusively" from the resale. *See* Notice of Inquiry at 58176. Rather, as the 1992 Report recognized, successful artists "secure ever increasing prices as their reputations grow and they sell successive works." 1992 Report at 144. This is because the resale of one piece helps establish the market value for that artist's work more broadly, and the artist is able to capitalize on this increase by charging higher prices both for new works and for unsold earlier works. *See* John Henry Merryman, Albert E. Elsen, and Stephen K. Urice, *LAW, ETHICS AND THE VISUAL ARTS* 604-05 (5th ed. 2007) (after 1973 auction at which Robert Rauschenberg's painting *Thaw* was resold for \$85,000 after originally being sold for \$900, the artist, who "still held a number of earlier paintings of the same period" "raised sharply [the prices for the earlier works] the day after the auction," as "[t]he widely-publicized sale . . . meant that Rauschenberg's new work immediately commanded much higher prices on the primary market").<sup>2</sup> Thus, successful artists "continue to maintain a connection with their body of work, albeit not the specific work resold, even after sale, undercutting one of the primary arguments supporting the royalty." 1992 Report at 144.

Finally, it is important to recognize the role played by others in the art world—including dealers, auction houses, online brokers, critics, and museums—in establishing and increasing the value of an artist's work. As crucial as the artist's contributions are to the calculus, "[t]he value of a work of art is not just the result of the artist's genius and its intrinsic merits." Simon Stokes, *ARTIST'S RESALE RIGHT (DROIT DE SUIITE): UK LAW AND PRACTICE* 6 (Institute of Art and Law 2012). Rather, as the Copyright Office recognized in 1992, a range of factors contribute to the market value of an artist's work, including

the premature death of the artist, his failure to live up to earlier promise, and any reduction in supply of an artist's work or inclusion in a well-known collection, as well as inflation in the art market generally. The price of art, like other commodities, varies with supply and demand, and the artist is only one of the many factors that impact price.

1992 Report at 137. Other key factors can include a dealer's efforts to promote the artist early in the artist's career, a critic's positive review of the artist's work, or a museum's decision to display the artist's work in a career retrospective. *See* John Henry Merryman, *The Wrath of*

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<sup>2</sup> In fact, the success of certain artists in the secondary market has allowed them to bypass the traditional artist-dealer relationship altogether and sell their new works directly to the highest bidder: "Primary sales by artists at auction have also become more common, with some artists availing themselves of the greater publicity this affords. Many dealers cited Damian Hirst's *Beautiful Inside My Head Forever* straight-from-the-studio solo auction at Sotheby's in September 2008 as a clear example of the phenomenon . . . ." 2011 TEFAF Report at 115.

## COVINGTON &amp; BURLING LLP

Maria Pallante  
 December 5, 2012  
 Page 8

*Robert Rauschenberg*, 41 AM. J. COMP. L. 103, 108-09 (1993). Without intending to diminish in any way the tremendous talents of so many artists, the Auction Houses respectfully suggest that the concept of the resale royalty underestimates, if not altogether disregards, the significance of forces that are outside the artist's control and that contribute to both the recognition of particular artists' works over time and the existence of a secondary market for those works.

### III. National Resale Royalty Legislation Would Not Benefit Artists or the Public

#### A. To Those Who Have, More Will Be Given

Supporters of the resale royalty often argue that the royalty is necessary because, without it, the struggling artist "shares none of the gain, if his work is resold for a large profit." Donald M. Millinger, *Copyright and the Fine Artist*, 48 GEO. WASH. L. REV. 354, 376 (1980). As explained above, this reasoning is faulty on several levels, given that the works of most American artists are not being resold in the secondary market, and that when their works are resold, the artists tend to share indirectly in any appreciation their works have enjoyed.

Yet, even if there were other reasons to implement a resale royalty, such legislation still would not have the desired effect, as the royalty would end up helping only the most successful artists, while leaving lesser-known artists in essentially the same position they were in before. The Copyright Office recognized this in its 1992 Report when it cited evidence showing that "as few as one percent of artists will qualify for the royalty." 1992 Report at 145. As suggested above, subsequent analysis of the U.S. art market has confirmed this disparity, which is likely even wider than originally believed. See Wu, *Art Resale Rights and the Art Resale Market*, at 543-44 (1999 study finding that only approximately 0.15 percent of U.S. artists have works that have resold for \$1,000 or more).

Many prominent European artists recognized this feature of a resale royalty right and opposed its adoption across the EU precisely because a resale royalty "was designed to benefit artists, but instead creates a shameful inequality between famous artists on the one hand and struggling artists on the other." *Artists criticise royalties deal*, CNN.COM, July 3, 2001, <http://edition.cnn.com/2001/WORLD/europe/07/03/artists.royalties/> (internal quotation marks omitted) (quoting statement of group Artists Against Droit de Suite); see also Henry Lydiate, *Copyright & Resale Right*, ARTQUEST (2001), <http://www.artquest.org.uk/articles/view/copyright-resale-right1> (listing Karel Appel, Georg Baselitz, Anthony Caro, David Hockney, and Sigmar Polke as among established artists opposing EU resale royalty directive).

The EU's experience over the past several years has confirmed that resale royalties primarily, if not exclusively, benefit those artists who need help the least. For example, prior to adoption of the resale royalty in the UK, a Member of Parliament who supported the resale royalty predicted that at least half of the approximately 85,000 to 95,000 working fine artists in Britain would receive some amount of royalty payment under the new regime. In fact,

## COVINGTON &amp; BURLING LLP

Maria Pallante  
 December 5, 2012  
 Page 9

according to an independent 2008 study sponsored by the publication *Antiques Trade Gazette*, only 568 British artists received resale royalty payments during the first eighteen months that the resale royalty law was in effect in the UK. Toby Froschauer, *THE IMPACT OF ARTIST RESALE RIGHTS ON THE ART MARKET IN THE UNITED KINGDOM* 16 (2008).

Just as striking was the lopsided distribution in the UK of funds among this already elite group. The same 2008 study found that 80 percent of the money collected went to just the top 10 percent of artists who earned royalties, and that the top twenty artists alone received a full 40 percent of the total collected. *Id.* at 17. This top twenty included some of the UK's most famous contemporary artists, such as Damien Hirst, David Hockney, Lucian Freud, and Banksy. *Id.*; see also Katy Graddy, Noah Horowitz, and Stefan Szymanski, *A STUDY INTO THE EFFECT ON THE UK ART MARKET OF THE INTRODUCTION OF THE ARTIST'S RESALE RIGHT* 32 (IP Institute 2008) (finding that "around 70% of artists receiving [resale royalties] would classify themselves in the top two quintiles [of national household income] while a relatively small fraction would be likely to appear in the lowest quintile"). This imbalance is likely to prove even greater under a system that imposes a royalty on only high-price resales, such as in the proposed bill before Congress. See S. 2000, 112th Cong. (2011) (applying royalty to auction resales of \$10,000 or greater).

Available data for the entire EU confirms the narrow and lopsided benefit conferred by a resale royalty. In all, based on a conservative estimate of the total number of artists currently working in the EU, 97 percent of living artists in the EU—and likely even more—have not earned any money from the introduction of the resale royalty. See 2011 TEFAF Report at 123 (works by only 5,072 living European artists resold at auction in 2010, out of 168,232 total "sculptors, painters, and related artists" according to the *Eurostat Labour Force Survey*, which does not account for unemployed artists or artists who earn their income primarily from another job). Rather, most of the royalties paid in the EU do not benefit living artists at all. Instead, the main beneficiaries of the EU directive have been the heirs of deceased artists (receiving 74 percent of all royalties collected)<sup>3</sup> and collecting societies (which on average retained 20 percent of the funds collected). Arts Economics, *RESPONSE TO THE CONSULTATION ON THE IMPLEMENTATION AND EFFECTS OF THE RESALE RIGHTS DIRECTIVE (2001/84/EC)* (The European Coalition of Art Market Organisations 2011). A mere 6 percent of resale royalties paid went to living artists, and, as discussed above, nearly all of that amount went to already well-known and well-compensated artists. *Id.*

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<sup>3</sup> These statistics represent all EU countries except for the UK, whose resale royalty legislation was just recently extended to cover the works of deceased artists.

## COVINGTON &amp; BURLING LLP

Maria Pallante  
 December 5, 2012  
 Page 10

**B. No Additional Incentive to Create New Works**

The concentrated effect of the resale royalty also means that few artists would have additional incentive to create new works if a resale royalty was put in place. As U.S. copyright law is grounded in the constitutional mandate “[t]o promote the progress of science and the useful arts,” U.S. CONST., Art. 1, § 8, Cl. 8, the role of copyright is to “motivate[] creativity, while encouraging the broad public dissemination of works to the public. Thus, in contemplating changes to the copyright law . . . this constitutional framework serves as a logical matrix for balancing creator and user rights.” 1992 Report at 127-28.

To begin, there is no reason to believe additional incentive is required to stimulate the creation of new works, as the U.S. art scene continues to flourish. *See, e.g.,* Rachel Corbett, *Miami’s Art Gamble Has Paid Off—Can Atlantic City Follow Suit?*, ARTINFO.COM, Nov. 27, 2012, <http://www.artinfo.com/news/story/843431/miamis-art-gamble-has-paid-off-can-atlantic-city-follow-suit> (reporting that Art Basel Miami Beach is “America’s biggest art fair,” bringing Miami “an estimated \$500-million economic boost each year”); Roberta Smith, *Like Watching Paint Thrive: In Five Chelsea Galleries, the State of Painting*, N.Y. TIMES, June 28, 2012, <http://www.nytimes.com/2012/06/29/arts/design/in-five-chelsea-galleries-the-state-of-painting.html>; Molly Glentzer, *Fair Shows Houston Thriving as Fine Art Market*, HOUS. CHRON., Sept. 14, 2012, <http://www.chron.com/news/article/Fair-shows-Houston-thriving-as-fine-art-market-3866890.php>.

And even if additional incentive were needed, a resale royalty right is not the solution because so few artists would benefit. Rather, the parties who would benefit from the royalty are very successful living artists, who already have sufficient incentive to continue producing art, and entities that do not create new works—the estates of successful deceased artists as well as collecting societies. In fact, economic analysis suggests that a resale royalty would *reduce* artists’ incentive to create new works. *See* William M. Landes & Richard A. Posner, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 38 (2003). As discussed in more detail below, where it has been adopted, the resale royalty right is typically made non-waivable, so that an artist always holds the right to collect royalties, even if he does not wish to. In this way, the artist is “prevent[ed] from shifting risk” to a buyer “because he cannot contract away his right of reclamation.” *Id.* As the buyer “must share any future speculative gains” in the work with the artist, economic analysis suggests that the buyer “will pay him less for the work, so the risky component of the [artist]’s expected remuneration will increase relative to the certain component.” *Id.*

From this perspective, the resale royalty right does not fit within the boundaries of U.S. copyright law, as it does not stimulate the creation of new works and might serve to dampen artists’ productivity.

## COVINGTON &amp; BURLING LLP

Maria Pallante  
 December 5, 2012  
 Page 11

#### IV. National Resale Royalty Legislation Will Likely Harm U.S. Artists and the U.S. Art Market

##### A. Negative Impact on Art Prices

In addition to doing nothing to benefit most U.S. artists, the resale royalty threatens to harm those same artists as well as the U.S. art market more broadly. A likely effect of the resale royalty would be to drive down the prices that buyers are willing to pay for works of art. The Copyright Office recognized this in its 1992 Report, noting that “decreased prices for works of visual art in the primary market” are “the consequence of the later royalties.” 1992 Report at 128. Economic analysis explains that this decrease is the result of the artist’s continued ownership interest in the work even after its sale:

Rather than the full bundle of property rights passing over to the new owner at the first sale, the artist still retains certain rights, and this lowers the value of the work. The decrease will obviously depend on the amount of the resale right, on the expectations the artist and his client have about future resale values, on the way they both value risk, and on their time preference, but the resulting effect is clear: there will be a decrease and the artist will earn less. In competitive markets, the rebate on the price of the new artwork will exactly represent the expected discounted value of the future resale right.

Victor Ginsburgh, *The Economic Consequences of Droit de Suite in the European Union*, 35 ECON. ANALYSIS & POLICY 61, 62 (2005).<sup>4</sup>

<sup>4</sup> In practice, attempts to quantify the effect of the resale royalty on art sales prices have proven inconclusive to date. See, e.g., Chanont Banterngahansa & Kathryn Graddy, *The Impact of the Droit de Suite in the UK: An Empirical Analysis* (Sept. 10, 2010), <http://people.brandeis.edu/~kgraddy/published%20papers/BanterngahansaGraddyJCE2011.pdf>. The UK is by far the biggest market to have recently adopted the resale royalty and so is ideally positioned for an analysis of how the legislation is likely to affect art markets around the world. However, the full impact of the resale royalty in the UK will not be known until experts have studied the effects of its application to both living artists and the heirs of deceased artists for up to seventy years after the artist’s death (and the latter, as noted in the text, represents the lion’s share of affected sales). See *id.* at 34. As this expansion of the right to deceased artists took place less than a year ago, in January 2012, more time is needed to gather and analyze data. See *Report on the Implementation and Effect of the Resale Right Directive (2001/84/EC)*, at 10, COM (2011) 878 final (Dec. 14, 2011), [http://ec.europa.eu/internal\\_market/copyright/docs/resale/report\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/resale/report_en.pdf) (acknowledging “pressures on European art markets, in all price ranges, and for both the auction and dealer sectors” and noting that the scope of UK resale right would be “significantly expanded” in 2012). Finally, it is important to note that royalties paid under the EU directive are capped (at €12,500), so the effect on U.S. art prices could be even greater if the U.S. were to enact legislation that does not limit royalty amounts, as with the bill currently before Congress.

## COVINGTON &amp; BURLING LLP

Maria Pallante  
 December 5, 2012  
 Page 12

Of course, an artist might be able to counteract this negative effect if she had the option to waive the resale royalty by contract when selling her work: the artist could then negotiate a higher first sale price for her work in exchange for transferring to the buyer her complete set of property rights. However, as set out in the Berne Convention and as implemented in the EU and elsewhere, the resale royalty right has been typically made inalienable. *See* 1992 Report at 128 n.13 (citing Berne Convention Article 14*ter* (1)). Artists thus have no option to waive the right to a resale royalty, even if they would prefer to forego the possibility of such income in the future in exchange for the certainty of a higher sale price in the present.

A decrease in first-sale prices is especially problematic for the large majority of artists whose works do not increase in value and are never resold. As noted in the Copyright Office's 1992 Report, "except for well-established artists, who might ultimately benefit from royalties despite the initial price decrease, most artists' works do not increase substantially in value and the resale royalty will not make up for the initial deficiency." 1992 Report at 128 n.15. Nothing has changed since 1992 that would alter this outcome. Rather than offering artists a realistic chance of increased earnings from the secondary market, the resale royalty would in fact jeopardize the money they are presently able to earn through the primary market.

#### **B. Reduced Investment in Young Artists**

Another risk of the resale royalty right is that it would make it more difficult for young, unestablished artists to find the support they need to succeed in the market—an obviously problematic result for a law aimed at helping such artists. Again, the Copyright Office predicted this outcome in its 1992 Report, noting, for example, that because "the works of young artists are not immediately profitable and need to be subsidized by more successful, established artists," "the resale royalty could reduce the number of unprofitable exhibitions of inexperienced artists," particularly in smaller art galleries. 1992 Report at 133.

The EU's experience has borne out the 1992 Report's prediction. A survey of art dealers in the UK found that the resale royalty "discouraged [dealers] from investing over longer periods of time in younger emerging artists" and made them "less likely to purchase works outright from artists at the start of their careers." Froschauer, *THE IMPACT OF ARTIST RESALE RIGHTS*, at 19. In fact, according to the study, "[m]any smaller dealers exhibited a tendency to move away from living European artists altogether as a result of the administrative burden and impact on their profit margins." *Id.* at 21. These dealers are precisely the people most likely to support and promote the careers of artists who need time and guidance to develop a market for their artwork. By discouraging these critical early investments, the resale royalty could impede the progress of the very artists it seeks to help.

## COVINGTON &amp; BURLING LLP

Maria Pallante  
 December 5, 2012  
 Page 13

### C. Driving Art Sales to Other Countries

Artists are not the only ones likely to suffer as a result of the resale royalty. Adopting resale royalty legislation in the United States could drive art sales—especially sales of the highest-profile works—out of this country and to other markets that do not impose the same restrictions.

The global art market has made a strong recovery since the financial crisis of 2008-2009, growing 7 percent in 2011 to a total of €46.1 billion, or approximately \$59 billion based on current exchange rates. *See* Clare McAndrew, *THE INTERNATIONAL ART MARKET IN 2011: OBSERVATIONS ON THE ART TRADE OVER 25 YEARS 19* (TEFAF 2012) (“2012 TEFAF Report”). The U.S. has played an important role in the recovery, accounting for 29 percent of global art sales in 2011. *Id.* at 23. Yet the U.S., once the dominant player, has lost ground in recent years; in 2006, for example, it controlled 46 percent of the market. *Id.* In 2011, for the first time in recent history, the U.S. ceded its number one ranking to China, which accounted for a 30 percent share of the overall market, a dramatic increase over China’s 8 percent share of just five years ago. *Id.* at 23. Likewise, in the markets for both Contemporary art (artists born after 1945) and Modern art (artists born between 1875 and 1945)—the two sectors of the art market that would be most directly affected by a resale royalty right—the U.S. recently fell to second place in terms of sales by value. *Id.* at 45-46, 48-49.

In a competitive international market, many factors can influence where a seller decides to bring its business—including whether a given jurisdiction collects resale royalties. This was true in 1976 when California enacted its resale royalty legislation, as prominent auction houses, including Sotheby’s, moved their contemporary art auctions out of Los Angeles, to the benefit of the New York art market. *See* Merryman, *The Wrath of Robert Rauschenberg*, at 116-117. And this remains true today. The European Commission recently reported that one effect of the EU’s resale royalty has been to increase the likelihood that sales of higher-priced works are diverted “to markets where transaction costs overall are lower, even taking account of transportation costs”:

In this vein, auction houses have noted cases of clients choosing to re-locate sales to New York, citing the resale right as a cost factor in that decision. The dealer sector has noted a tendency to shift transactions to one of the burgeoning international art fairs, with Art Basel [in Switzerland, which does not impose a resale royalty,] being cited as a case in point. In summary, sellers will rationally move to do business in those markets where the transaction will be most beneficial, and the resale right is one in a number of factors that play a role in the choice of sales location.

## COVINGTON &amp; BURLING LLP

Maria Pallante  
 December 5, 2012  
 Page 14

*Report on the Implementation and Effect of the Resale Right Directive (2001/84/EC)*, at 7; see also 2011 TEFAF Report at 75 (finding that introduction of resale royalty “into the EU alone has effectively replaced an internal trade distortion with an international one, to the general disadvantage of the EU’s art market”).

If the U.S. were to adopt resale royalty legislation, the share of the market that has recently been redirected from Europe to New York to avoid higher costs could once again be rerouted, this time to China, Switzerland, and other markets that do not levy a royalty on resales. This result is made even more likely by the increasing role of online auctions and telephone bidding, both of which help resellers move the physical location of an auction without significantly reducing the number of participating bidders. At the Auction Houses’ major sales of Impressionist, Modern, and Contemporary artworks, for example, typically substantially more than half the bidding is conducted through the submission of written bids, telephone bids, or internet bids. See also 2012 TEFAF Report at 102 (“The growth of the internet and use of the online channel has changed the infrastructure of the market, its accessibility to both buyers and sellers, and has dramatically altered the way business is conducted within the art trade.”). In fact, depending on the size of the royalty enacted in the U.S., some U.S. sales might even move back to London or other EU markets if those markets’ royalty rates are perceived as less onerous. Compare S. 2000, 112th Cong. (2011) (proposing flat 7 percent royalty on all works sold at auction in the United States for at least \$10,000), with Artist’s Resale Right Legislation, 2006, Sch. 1 (UK) (setting regressive royalty rates according to price range, with highest rate of 4 percent for sales up to €50,000).

Further, if art sales leave the U.S., it will affect not only those in the art industry, like dealers and auction houses, but also the economies of the communities in which they are located. In total, the U.S. art market includes an estimated 71,260 businesses, which last year generated more than \$17 billion. See 2012 TEFAF Report at 83, 185. Further, a recent study found that, in 2005, New York City art galleries and auction houses alone made \$659 million in direct expenditures within the city, including wages and benefits, rent, printing and publishing, shipping, and other fees. Alliance for the Arts, ARTS AS AN INDUSTRY: THEIR ECONOMIC IMPACT ON NEW YORK CITY AND NEW YORK STATE 44 (2006). With a multiplier effect of 2.12—meaning that an additional \$1.12 was generated in the city for each dollar of direct spending by the galleries and auction houses—these expenditures had a total economic impact of \$1.4 billion. *Id.* at 46. Fewer art sales in New York and other markets as a result of a resale royalty would mean reduced spending in the U.S. and, overall, a reduced economic impact of the art market on the U.S. economy.

#### **D. Decreased Transparency in the Art Market**

Implementing resale royalty legislation could have the further unintended consequence of reducing the public’s access to information about art sales in the secondary market. Were the royalty selectively applied to only certain portions of the art market like



## COVINGTON &amp; BURLING LLP

Maria Pallante  
 December 5, 2012  
 Page 15

auction houses, as is true under the bill currently pending before Congress, it would likely drive a greater number of art sales to less public (and less publicly documented) venues, such as galleries, private dealers, and internet sales. See Shane Ferro, *Four Things to Know About the Nutty New Droit de Suite Bill Introduced in Congress Last Week*, ARTINFO, Dec. 21, 2011, <http://www.artinfo.com/print/node/754023>.<sup>5</sup> For the small portion of artists who have a secondary market, a reduction in sales at public auction would deprive them of a critical tool for establishing a public record of their work's value, which, as described above, could in turn reduce their ability to demand higher prices on the primary market. This shift away from public auctions would also effectively bury critical information about a work's provenance—that is, the complete history of ownership of a particular work—thus hindering the important work of art scholars and historians.

#### V. Conclusion

The Auction Houses believe in—and, in the long term, thrive on—a robust market for emerging artists. However, as discussed above, a resale royalty does nothing to help this market and actually stifles it. Absent identification of an actual problem in the art market to be addressed and compelling evidence that a resale royalty will do so, there are no good reasons to enact a federal resale royalty right in the country, and many reasons not to do so. As the Copyright Office concluded in 1992, there may be ways that Congress can meaningfully help artists selling in the primary market, but a resale royalty right is not one of them. See 1992 Report at 151.

The Auction Houses appreciate the opportunity to provide these comments in response to the Notice of Inquiry and would be happy to provide additional information or testimony if that might be useful to the Copyright Office.

Very truly yours,



Simon J. Frankel

<sup>5</sup> Applying the resale royalty to auction houses and not other sectors of the art market is not only counterproductive—it is anti-competitive and distorts the market. The European Commission recognized this when it rejected the French model of *droit de suite*, which was imposed on auction houses only, and insisted that the royalty must be applied to *all* resellers. See *Proposal for a European Parliament and Council Directive on the resale right for the benefit of the author of an original work of art*, at 21, 26, COM (1996) 97 final (Mar. 13, 1996).

COVINGTON & BURLING LLP

Maria Pallante  
December 5, 2012  
Page 16

cc: Karyn Temple Claggett, United States Copyright Office (via email)  
Jason Okai, United States Copyright Office (via email)  
  
Jonathan Olsoff, Sotheby, Inc. (via email)  
Sandra L. Cobden, Christie's, Inc. (via email)

## Statement on Behalf of the Visual Artists Rights Coalition

### Hearing on Moral Rights, Termination Rights, Resale Royalty and Copyright Term

Subcommittee on Courts, Intellectual Property and the Internet  
Committee on the Judiciary  
United States House of Representatives  
July 15, 2014

#### Meaningful Copyright Protection for Artists – the Need for an Artists’ Resale Right in the United States

Like all creators, the primary legal right of an artist in his work is copyright. Yet, artists stand alone within America’s creative community in their inability to gain any significant income under existing copyright law. As an example, creators of music will collect nearly \$2 billion in copyright royalty payments this year. By contrast, America’s visual artists receive only a tiny amount of copyright income – primarily when their works are reproduced in publications such as museum catalogues. This is due to the difference between the way music and art generate money in the marketplace. Music makes money from copyright when it is publicly performed – on the radio, on TV, in movies, in concerts and on the Internet – or when it is reproduced in CDs and other formats. Visual art generates serious money only when the original work itself is first sold. And, the vast majority of money-making sales (\$ 2.2 billion in U.S. auctions last year) are not by artists themselves but by collectors, dealers and auction houses who trade in their works after their first sale. Under current law artists receive no income from these sales.

Since 1988, the international rights of American copyright holders have been governed by the Berne Convention on Literary and Artistic Rights, a treaty administered by the World Intellectual Property Organization (WIPO). Prior to U.S. adherence to the treaty, Congress reviewed our copyright law and enacted the changes to our laws that would be necessary bring the U.S. into compliance with the Berne Convention.

Two provisions of the Berne Convention relate directly to the unique circumstances of visual artists: Article 6*bis*, which requires that member countries provide individual authors and artists with “moral rights” and Article 14*ter*, which recognizes that of authors of “works of art” have the right to “an interest in re-sales” of their original works. The Berne Convention uses the term, *Droit de Suite*, to describe this right.

Both moral rights and resale rights deal with the actual physical work of an artist as opposed to reproductions of the work and remain with the artist even after ownership of the physical embodiment of a work has been transferred to another. Subsequent owners of the physical work are bound by these rights.

An artist’s moral rights include the right to attribution as the creator of the artwork and the right to object to any “mutilation or other modification of the work...that would be prejudicial to his honor or reputation.” The resale right simply gives the artist the right to receive compensation whenever a painting, sculpture or other original work of art is resold.

However, unlike moral rights and other rights protected under the Berne Convention, individual countries are not required to recognize the artists' resale right.

When the U.S. joined the Berne Convention in 1988, the Copyright Act did not specifically provide for either moral rights or resale rights. This inconsistency was addressed in legislation which had been introduced in 1987 but which had not yet been enacted by the time the United States actually signed the Berne treaty. This 1987 legislation, entitled "The Visual Artists' Rights Act," proposed new provisions be added to the copyright law specifically dealing with works of "visual art." The bill defined a "work of visual art" as "a painting drawing, print or sculpture." "Prints" covered by the bill were restricted to those created for "a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author."

The 1987 Visual Artists' Rights Act would have amended the Copyright law to give artists both the "moral rights" provided under Article 6*bis* of the Berne Convention as well as resale rights provided under Article 14*ter*.

When Congress enacted the implementing legislation necessary to permit American negotiators to sign the Berne Convention, the moral rights and resale rights provisions of the Visual Artists' Rights Act were not included. The implementing legislation took a *deminimus* approach to harmonizing U.S. law with the Berne treaty. However, two years later, the Visual Artists' Rights Act was re-introduced and was enacted in December 1990.

This Act amended the copyright law to recognize – for the first time – in federal statutory law visual artists' moral rights. It included the definition of "work of visual art" from the 1987 bill as well as the moral rights provisions, adding a new section 106A, entitled "Rights of certain authors to attribution and integrity." This brought the U.S. into compliance with the mandatory requirement of Article 6*bis* of the Berne Convention. However, the resale rights language which would have implemented Article 14*ter* was removed and replaced with a statutory mandate to the Copyright Office to study the issue and report back to Congress in two years with recommendations.

In December, 1992, Register of Copyrights Ralph Oman submitted a 156 page report to the Congress entitled, *Droit de Suite, the Artist's Resale royalty*. This report contained a lengthy description of the history of the issue, the state of similar laws at that time in other countries, a discussion of the pros and cons of enactment of a resale right, and alternatives that might be considered by the Congress.

The 1992 Report found that there was a good case for a better system of incentives and remuneration for their labors for artists. It observed that "it may be argued that the potential for increased remuneration [provided by a resale royalty] is a potent incentive for further creation." It also concluded that "when all is said and done. The art market may absorb royalty costs, like other costs associated by art transactions, without a ripple."

However, the report recommended that Congress explore other alternatives first. These were: (1) a broader public display right where "museums and public art galleries might pay a fee to display works of art publicly;" (2) a commercial rental right; (3) a compulsory license to be paid by the owner of the work or a copy in cases of "public display" of the work; and (4) increased federal grants to artists or increased funding for the purchase of artworks for federal buildings.

The 1992 report also observed that the "international community is now focusing on improving artists' rights, including the possibility of harmonization of *droit de suite* within the European Community." And,

it recommended that “should the European Community harmonize existing *droit de suite* laws, Congress may want to take another look at the resale royalty, particularly if the Community decides to extend the royalty to all of its member States.” (Italics supplied.)

However, none of these suggestions have been adopted during the twenty years since they were made.

After a long hiatus, the Copyright Office again reviewed the issue of artist’s resale royalties. In December 2013 the Office issued a new report entitled *Resale Royalties, an Updated Analysis*. The updated report found that the international situation has changed significantly since 1992. The Office observed that more than 70 countries now provide for artists’ resale rights in their national laws, including the United Kingdom – a longtime hold out – as well as all the other members of the European Union. However, the Copyright Office observed that American artists are not able to benefit from the new, harmonized European law and the similar laws of other countries, because the U.S. does not offer a reciprocal right. The new study also concluded that the current copyright system in the United States does not offer incentives to creation to visual artists comparable to other members of the creative community in our own country, such as writers of literature and music. The Copyright Office “now supports legislation as a possible means to address the disparity in the treatment of artists under the current legal system.”

In response to the Copyright Office Report, the “American Royalties Too (ART) Act”, H.R. 4103, was introduced earlier this year by the ranking minority member of this subcommittee, Rep. Jerrold Nadler. The Visual Artists’ Rights Coalition strongly supports this bill and encourages the Subcommittee to include its provisions in any copyright reform legislation that may be developed.

The ART act would serve the Constitutional mandate contained in Article One, Section 8, which authorizes Congress to provide meaningful incentives for the creation of works of art and authorship. It recognizes that the individual creators, without whom the multi-billion dollar art market would not exist, should have the opportunity to receive remuneration for what, today, is the primary commercial use of their works. The bill authorizes a royalty of the lesser of five percent or \$35,000 of the price of a work sold at auction for more than \$5,000. Small auction houses with sales totaling less than \$1million annually are exempted from the requirement to assess the royalty. For the most part these are local auction houses where a large number of the works selling at prices that would not meet the threshold of \$5,000.

The bill is focused on original works of fine art that are not created for the purpose of mass reproduction. Covered artworks include paintings, drawings, prints, sculpture, and photographs existing either in the original embodiment or in a limited edition of 200 signed copies or fewer. In the case of works created originally for mass reproduction in publications, such as illustrations and cartoons, the resale right would attach only to the original painting or drawing by the artist. It would not apply to the mass produced copies. However, original paintings and drawings of such works that later become famous often take on significant value in the resale market and the artist would be able to benefit from this increased value as a continuing means of livelihood for himself or his heirs. This would be of particular value to cartoonists who created world famous characters decades in the past but never received more than minimal compensation even though their works have generated great wealth for others.

The royalty would be collected by the auction house at the time of sale of the artwork and, as in other countries recognizing the right, would be distributed by an artists’ collecting society designated as qualified by the Copyright Office. The collecting society would distribute payments to individual rights holders and, as is the practice of the music societies, disburse royalties to counterpart societies

representing foreign artists and receive and distribute royalties owed to American artists collected by the foreign societies for sales within their territories.

The resale right, like other rights under U.S. Copyright law, would expire at the end of the copyright term, 70 years after the artist's death.

The pending resale royalties legislation would generate only a fraction of the compensation currently received by other authors whose works find their primary value in uses such as broadcasting, film and publishing. But, it would enable American artists to receive compensation equally with foreign artists when their works are sold in international art markets in Europe and other parts of the world. International Auction houses that now provide royalties to British, French or German artists when works are sold at their locations in London and elsewhere would begin to treat U.S. artists equally.

The art resale market is an international market and the auction houses who dominate that market operate as effectively and profitably in London or Paris as they do in New York or San Francisco. By enacting artists' resale royalty legislation, Congress would create a level playing field and bring the United States fully into harmony with the community of nations, recognizing all of incentives to creativity provided in the Berne Convention.

#### **Background on the Visual Artists' Rights Coalition (VARC)**

Among the organizations whose views are represented in this statement, are the following.

**The Artists Rights Society (ARS)**, representing the copyright interests of over 50,000 visual fine artists or their heirs, including: Jackson Pollock, Alexander Calder, Georgia O'Keeffe, Frank Lloyd Wright, Mark Rothko and Frank Stella.

**The Visual Artists and Galleries Association (VAGA)** licensing the works, among others, of Jasper Johns, Richard Rauschenberg, Romare Bearden, Grant Wood and Maxfield Parish.

**The American Society of Illustrators Partnership (ASIP)**, a grassroots coalition of 12 national and regional visual artists' professional organizations, founded and funded entirely by working artists including winners of the Pulitzer Prize and other significant awards.

**National Cartoonists Society (NCS)**, the world's oldest and largest organization of professional cartoonists whose membership includes over 500 of the world's major cartoonists, working in all branches of the profession including newspaper cartoons, comic books, editorial cartoons, animation, greeting cards, advertising, magazines and books.

**The Association of American Editorial Cartoonists (AAEC)**, a professional association promoting the interests of staff, freelance and student editorial cartoonists in the United States.

**The Association of Medical Illustrators (AMS)**, the North American professional association of board certified medical illustrators, a highly specialized artistic discipline requiring Masters' level training in fields such as human anatomy, pathology, molecular biology, physiology, embryology and neuroanatomy.

**The American Society of Architectural Illustrators (ASAI)**, founded in 1986 to represent the interests of architectural illustrators throughout North America with over 450 current practitioner members.

**The Guild of Natural Science Illustrators (GNSI)** whose more than 950 members from all 50 states create illustrations in the fields of anatomy, anthropology, archaeology, astronomy, biology, botany, cartography, education, entomology, ichthyology, invertebrates, mammals, ornithology, paleontology, veterinary and wildlife.

**The American Society of Aviation Artists (ASAA)** whose members accurately and artistically render images of the machines and events in the history of flight.

**The Society of Illustrators Los Angeles (SILA)** whose 200 members create works seen by millions each year in all printed media, television, films the Internet and gallery exhibitions.

**The Society of Illustrators San Diego (SISD)**, an offshoot of the Society of Illustrators Los Angeles whose membership consists of illustrators in the San Diego region.

**The San Francisco Society of Illustrators (SFSI)**, since 1961 San Francisco Bay area regional association of illustrators whose works enjoy a nationwide audience in books, periodicals, postage stamps, advertisements, television and film. Its members' original paintings and drawings are on permanent display as part of the U.S. Airforce Documentary Art Program, the National Parks Art Program, the Department of Interior Art Collection, the Forest Service Art Collection and the collections of the National Aeronautics and Space Administration.

**The Pittsburgh Society of Illustrators (PSI)**, since 1996 the Pittsburgh area business and networking outlet for free-lance illustrators that exhibits and promotes members' works of the highest aesthetic caliber in conjunction with educational and arts organizations in the Pittsburgh region.

**The Illustrators Club of Washington DC, Maryland and Virginia (IC)**, since 1986 has provided a network for professional illustrators, graphic designers, educators, students, vendors and related businesses in the Virginia, District of Columbia and Maryland region.

**Submitted on behalf of the Visual Artists' Rights Coalition by:**  
**Bruce Lehman, Counsel**

**blehman@iipi.org**

